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NOTE

In the citations the name of the author and the reference are frequently given without the title or without the full title of the *work* referred to. For these titles turn to the Bibliography.

INTRODUCTION

The principal point to be discussed and decided in the present essay can be enunciated best in question form: Is a marriage contracted with a condition to preserve virginity forever, a true marriage? Is matrimonial consent, which is made dependent on such a condition, valid consent?

The question is not a new one, by any means, and at first sight may seem not worth the trouble of investigation. For in the case of questions which have been under dispute for centuries it is not generally possible to throw new light, or arrive at a conclusion. But we think, nevertheless, that our work is not in vain, because it offers the occasion for a more intimate study of the essence of marriage and at least will have the advantage of narrowing to a sharp point whatever difficulty there is in the problem.

Besides the problem is not merely academic. There are practical questions whose solution depends on an accurate and searching investigation of the essential object of consent. As an instance: How much *knowledge* of the copula is necessary for valid consent? Authors are disagreed. It is not the purpose of the present essay, of course, to attempt the solution of this problem or of any but the one just enunciated. However the fact remains: an accurate investigation of the essential object of consent may point the way to a solution of such problems. Then too, that the very question under discussion is not merely academic is attested by the fact that no longer ago than 1907 the Sacred Congregation of the Council was called upon to decide the validity of a marriage entered upon with an agreement which excluded intercourse[1]. And we have the testimony of H. RETT O.F.M. that in 1908 he himself knew of four cases of this sort of marriage in Vienna alone[2].

The importance of the general question of combining virginity with marriage can also be said to be historical. For in the course of centuries, there have been not a few devout couples who in their married life have preserved virginity. And in some cases the Church has praised them for it. We do not wish to make an argument out of these cases for our own problem. For we are discussing only the narrowly restricted case of a real *condition* of preserving virginity attached to consent. And the consent in the historical cases cannot be shown to have had a strictly conditional character. But we mention some of them merely to bring out the point, that some kind of combination of marriage with virginity has not only

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[1] ASS 40 (1907-1908) 494.

[2] "Wir schreiben über dieses Thema deshalb, weil solche Ehen, wenn auch selten, doch noch vorkommen; dem Schreiber dieses allein sind vier solchen Fälle (in Wien) bekannt". Cf. Zeitschrift für katholische Theologie, 32 (1908) 596.

been attempted by holy persons of the past, but the Catholic attitude has been one of *approval* with regard to such unions.

For instance we read of Edward the Confessor, of England; "Yielding to the entreaty of his nobles he accepted as his consort, the virtuous Editha, Earl Godwin's daughter. Having, however, made a vow of chastity he first required her agreement to live with him only as a sister"[3]. And the Roman Breviary, praising him for his chastity says: "Compelled to marry by the nobles of the court, it is the constant assertion of writers that in matrimony he preserved virginity with his virgin wife"[4].

Further there is the example of St. Pulcheria Augusta, who had made a vow of virginity and who therefore, when for state reasons it was decided she should marry Marcian, did so only "with the condition that her vow of virginity should be respected"[5]. Baronius' notes to the Roman Martyrology praised her for thus safeguarding her virginity in the married state[6].

Ecclesiastical history and legend have other examples to offer of pious Christians who lived virginally in the married state. CORNELIUS A LAPIDE gives the following interesting list of examples: "The *first*, is that of the Blessed Virgin and Joseph, who set up the standard of chastity not only for virgins but also for married persons. The *second*, is that of St. Cecilia and Valerian, noble martyrs, so that in this century after so many hundreds of years the body of St. Cecilia deserved to be found whole and unharmed, by Clement VIII. The *third*, is that of St. Julian and Basilissa, whose illustrious life is to be found in SURIUS. The *fourth*, St. Pulcheria Augusta, sister of Theodosius the Emperor, who, since she had vowed perpetual virginity to God, after the death of Theodosius married Marcian and made him Emperor on condition that he should preserve the chastity she had vowed to God; and this he did, according to the testimony of Cedrinus and others. The *fifth*, Henry II, Emperor, and Cunegond, who to prove her virginity walked unharmed over red-hot iron. The *sixth*, Boleslaus V [II?], Prince of the Poles, who thus got the name "The Pure", and Cunegond, daughter of Bela, king of the Hungarians. The *seventh*, Conrad, king, son of Emperor Henry IV, with his wife Mathilda. The *eighth*, Alphonse II, king of Asturia, who, preserving continence with his wife, received the name "The Chaste". The *ninth* example is given by Richardis, queen, who with her husband Charles the Fat, king, remained a virgin. The *tenth* is given by Pharalldis, niece of St. Amelberga, and also of Pippin, in marriage always a virgin. The *eleventh* is given by Edward III and Editha, virgins and spouses. The *twelfth* is given by Ethelreda, queen of the East Angles, who though twice married always remained a

[3]G. E. PHILLIPS, "Edward the Confessor," in: Catholic Encyclopedia, vol. 5, p. 322.

[4]October 13th, Second Nocturn.

[5]J. P. KIRSCH, "Pulcheria," in: Catholic Encyclopedia, vol. 12, p. 561.

[6]Martyrologium Romanum, (BARONIUS) Sept. 10th.

virgin. Finally, the *thirteenth* is given by two spouses of Auvergne, of whom Gregory of Tours relates. . . . . etc"[7]. CLERICATUS adds to this list: "Countess Mathilda of Italy, who by command of Pope Urban II married Duke Wulfo with this agreement, that he should preserve her vow of virginity inviolate, and so it was done"[8]. And the *Roman Breviary*, July 17, mentions St. Alexis.

The most important example of all however, is the marriage of the Blessed Virgin with St. Joseph.

To begin with, it is an article of Faith, defined more than once, that Our Lady was always a virgin,—before, during, and after the birth of Our Lord[9]. This point therefore, needs no elaboration.

In the second place, it is the common teaching of theologians that the marriage of the Blessed Virgin and St. Joseph was a true marriage. Although there has occasionally been raised a dissenting or doubtful voice[10], the arguments drawn from Sacred Scripture[11] and the Fathers[12] are considered conclusive. SUAREZ[13] says it is *de fide*, but SANCHEZ[14] thinks this censure too severe, as does VASQUEZ[15]. At present there seems

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[7]In commentary on I Cor. VII, 5 (Tom. 18 Commentariorum). What is to be thought of some of these examples historically one may judge from the following: FRANZ KAMPERS, "Henry II," in: Catholic Encyclopedia, vol. 7, p. 227 says: "The highly varied theme of his virgin marriage to Cunegond has certainly no basis in fact". (Cf. DE SMET n. 156 nota 6 for historical literature on marriage of Henry and Cunegond). And J. P. KIRSCH, "Cecilia," in: Catholic Encyclopedia vol. 3, p. 471, says: "The relation between St. Cecilia and Valerianus . . . . . mentioned in the Acts has perhaps some historical foundation". But the story of Cecilia as found in the Acts in general, "has no historical value; it is a pious romance like so many others compiled in the fifth and sixth century". Some of the other examples, too, must undoubtedly be condemned from the point of view of history; but all, true or false, illustrate the Catholic *attitude* in the past towards virginal marriage. But cf. Chap. IX note 46.

[8]Decis. II n. 16. St. Peter Canisius also has words of praise for some of the virginally married spouses of legend and history. Cf. Vogt's excerpts from CANISIUS' Life of the Blessed Virgin, p. 44.

[9]POPE ST. SIRICIUS (Denzinger n. 91 and documents noted there). MARTIN I (Lateran Council, Denzinger n. 255 256 etc.)

[10]FREISEN, Introduction to the 2nd edition of his Geschichte des Canonischen Eherechts, p. xxiii, explains his reasons for having held the "Copulatheorie" of marriage,—a doctrine with which the true marriage of the Blessed Virgin could not be reconciled—and retracts it. LEITNER, p. 136, says that the marriage of the Blessed Virgin was only putative in "foro externo". For this opinion he was criticized by WERNZ, Jus Decretalium, IV, n. 302 nota 41 circa finem. SCHEEBEN, Dogmatik, Vol. III, Part I, n. 1575 sq. holds that the marriage of the Blessed Virgin though real, is different *in nature* from other marriages.

[11]Matthew I, 16, the genealogy of Christ; and Matthew I, 20 "Fear not to take unto thee Mary thy *wife*" etc. MALDONATUS on Matt. I, 18 says "Teneamus ergo quod omnes aut optimi Theologi tenent, verum

to be hardly any opposition to the dictum of LAMBERTINI, afterwards Benedict XIV: "Those who affirm that the marriage of the Blessed Virgin with St. Joseph consisted merely in the *sponsalia* have a false and temerarious opinion. Accordingly it must be held that the marriage contracted between them was *verum et ratum*"[16].

It is not to the purpose to discuss here the vow of chastity of the Blessed Virgin, the question whether it was conditional or absolute, the question whether St. Joseph had a vow of chastity, whether he and the Blessed Mother had a pre-marital *agreement* to preserve chastity, or whether the Blessed Virgin had a revelation that her chastity would be safe in a marriage with St. Joseph. Much less do we intend to make the assertion as Vasquez does[17], that their marriage was actually contracted with a *condition* to preserve chastity. For these questions are for the most part involved in so many uncertainties and varieties of opinion that little can be derived from them but conjecture[18].

But this much is true. In the marriage of the Blessed Virgin and St. Joseph we have a sure example of the combination of marriage and virginity. And in it we have a norm that will prevent us from seeking a solution to our difficulty which would be at variance with Catholic teaching[19].

It is not useless to repeat, then, that from these examples, even from that of the Blessed Virgin, we do not intend to draw any *direct* conclusions nor to prove *directly* our thesis. Historically it is too uncertain that they are examples of true *conditional* consent. Our object in citing them has

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fuisse iam tum cum Christus conceptus fuit inter Josephum et Mariam matrimonium".

[12]For example: ST. AUGUSTINE, De Nuptiis et Concupiscentia, lib. I, cap. 11, (n. 12, 13) P.L. 44-420; Contra Faustum, lib. 23, cap. 8, P.L. 42-471; ST. AMBROSE, De Instit. Virg., cap. 6, n. 41, P.L. 16-316; ST. BASILIUS M., De Sancta Christi Generatione, n. 3, 5, P.G. 31-1463, 1467; ST. JEROME, Contra Helvidium, n. 4, 19, P.L. 185 seq. 203. (The citations and argument are to be found in Pesch VII, De sacr. Matr. n. 734).

[13]De Incarn. pars II disp. 7, sect. 1.

[14]De Matr. lib. II, diap. 28, n. 1.

[15]De B. M. Virg., disp. 125, cap. 3. VASQUEZ thinks some note of temerity attaches to the denial and remarks that the opinion of CANISIUS that it is a "libera controversia" cannot be sustained.

[16]De Synodo etc., lib. 13, cap. 22, n. 13.

[17]De B.M. Virg. disp. 125, cap. 6 and 7.

[18]On these points, besides the classic commentators, in IV Sent. Dist. 28, c. 3, cf. particularly, PALMIERI, De Matr. thes. III; TERRIEN, Mère de Dieu et Mère des Hommes, II, 182 sq. LÉPICIER, De S. Jos. pars. 1, Art. 4 sq.; De B.V.M. pars II, cap 3; De Matr., q. 5 art. 4; ESTIUS, lib. 4 dist. 30 paragr. 4 sq.

[19]KNECHT, p. 592 note, says that in solving this problem we should not begin with the marriage of the Blessed Virgin;—it was too mys-

been rather to illustrate the Catholic *point of view*, traditionally, with regard to the combination of marriage with virginity. To this purpose, the legendary examples serve as well as the historical ones,—especially when we have words of approval from the Church's liturgy. These examples, then, stand in the background of the question of combining marriage with virginity by means of a strict condition, serve as an introduction to it, and prevent from the beginning the idea that the whole concept is fantastic or self-contradictory.

And it is in this historical and theological background that we find our point of departure. We want to investigate *just how far* it is possible to go in combining these two states of life. Theologians and canonists have not had much difficulty in admitting that if the parties have a simple *intention* to preserve virginity, the validity of the marriage is not endangered. Nor is there much discussion of the case where the parties enter marriage bound by a *vow* of chastity. Many (even of those who do not admit the case of the strict condition) would admit that a simple contractual agreement to preserve chastity, entered into before marriage but not made a condition of consent, does not invalidate consent[20]. But when the question is pushed to the limit, as we have proposed it, there is a real difference of opinion. The authors part company. They all admit the sanctity of the intentions of people who out of a love of chastity desire to enter such a marriage. But to some the combination when pushed that far becomes a contradiction. "Either one thing or the other"! says KNECHT[21].

The opinion which is to be explained and proved in the following pages, however, is that the condition of virginity attached to marriage consent does not invalidate it.

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terious and extraordinary to be a good starting point. Cf. also SCHEEBEN, Dogmatik, vol. III, pars I, n. 1575 sq.; and KREUZWALD, "Josephsehe," in: Kirchenlexikon, vol. 6, col. 1878. This idea that we can learn nothing about our problem from the marriage of the Blessed Virgin, because it is not like other marriages is a variation of the scholastic adage: "Abnormale non est norma normalis"; and may be answered thus: It is true that the abnormal does not make a good starting point for the investigation of the normal. But it can never be true that the *essence* of a thing can be otherwise in abnormal instances of that thing than in normal ones. And since it is common teaching that the marriage of the Blessed Virgin was a true one, that is, one in which the essential definition of marriage was verified, then we must not explain the essence of marriage in such a way that it will not fit the marriage of Our Lady. This is what we mean in saying that the consideration of that marriage will keep us from "seeking a solution. . . . . at variance with Catholic teaching".

[20]For example KNECHT, p. 591 note 1; and BILLOT, De Ecclesiae Sacramentis, II, p. 341. Cf. below, Chap. VI nota 47.

[21]P. 591 note 1: "Das eine oder das andere!" Cf. also HUSSAREK, Die Bedingte Eheschliessung, (Wien 1892) p. 233, "There is no doubt that Christian ethics and with them Canon Law attribute to virginal

And although the object of the present essay is to investigate a *particular condition*, at first sight seemingly contrary to the substance of matrimony, it will not be possible to discuss that question profitably without first going into the more general question of the essential object of matrimonial consent. It goes without saying that one cannot assert that a given condition is contrary to the substance of the consent unless one has a clear idea of what the substance of the consent is. And if we could define clearly and beyond dispute the two things: first, the essential content of the consent, and second, the exact meaning of the condition, then of course a mere comparison of them would solve the problem proposed. Hence it is our purpose to try to arrive at a clear idea of the essential object of consent, before trying to investigate the condition itself.

And in the very beginning it is well to note a point which is lost sight of at times—because it appears to be a truism. When two people get married the essential object of their consent is the *marriage*. Hence to investigate the essential object of matrimonial consent means to investigate the *essence of marriage*. Whatever it is that constitutes the minimum essentials of marriage in the present order of things, that it is which is also the essential object of consent [22]. In other words, the essential object of matrimonial consent is the essence of matrimony;—or, if you like, the essential consent means saying "Yes" to the essence of marriage[23].

Our plan then is to investigate first the essence of *marriage*. This investigation will constitute the *first part* of the essay. Having finished this preliminary, but by no means subsidiary question (since it will be a principal part of the inquiry), we will turn to the second part of the essay, which will be the direct treatment of the question proposed.

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chastity a higher virtue than to matrimonial ethics. The latter is held *good*, the former, *better*. The two goods are however incompatible with each other. One striving after Christian perfection has only one choice to declare for either one or the other. Hence a marital consent which aims at such an impossible harmonization is invalid because of its inherent contradiction. To declare consent under such a condition is not to declare true marital consent". (Quoted by TIMLIN, p 312).

[22]Coninck, disp. 24 dub. 4, n. 39, "Ad valorem matrimonii necessario requiritur primo consensus in id quod est de essentia, quia nihil potest existere sine sua essentia: cum igitur mutuus conjugum consensus sit de essentia hujus contractus ille consensus erit maxime essentialis qui fertur immediate in id quod est maxime essentisle matrimonio". Cf. likewise, BILLOT, De Eccl. Sacr. II, p. 329; and MASTRIUS, In IV Sent., Lib. 4 disp. 7, q. 3, art. 3, n. 102 (by mistake n. 192).

[23]This would be laboring the obvious, except that the form in which the doctrine of consent is given in the Code may tend to obscure the point. (Can. 1081 § 2)

PART I

THE ESSENCE OF MARRIAGE

CHAPTER I.

LIMITING THE QUESTION

In speaking of marriage, scholastic authors frequently use the terms: the essence of marriage, the substance of marriage, the integrity as opposed to essence, the properties, the *fines operis*, essential and accidental, etc. All this terminology is taken over from the ontology of physical being and applied to the institution of marriage. Yet for several reasons this application can be only analogous.

In the first place marriage is not a physical entity. It is an entity of the moral order, as will be explained in detail later on.

Secondly, not only is it a moral entity, or institution, but it is an institution only partially *natural* in origin. That is to say, it is constituted and has its being not merely from the absolute and eternally unchangeable primary dictates of the natural law, but also from the free will of God. To distinguish the parts which come from nature antecedently to God's free institution, and those which are consequent upon it, is not to our purpose. But the fact is, that in one stage of the divine economy marriage had one "essence" and in another, another. In paradise for instance, where there was real marriage[1] the element of remedy for concupiscence was not present[2]. Yet since the Foll this has been an "essential" or "intrinsic" end of marriage[3]. Likewise, though to-day unity and indissolubility are "essential properties" of marriages, there was a time when true marriage existed, according to God's institution and permission, without either of them. In dealing with physical beings there is the greatest difficulty in applying terms meant to describe a natural *unum per se* to an artificial entity. We can use the terms "substance" and "accident", "essence, and "properties", in analyzing the concept "man". They fit accurately because they were invented in an effort to analyze such natural beings. But to try to talk about the essence of a *watch* as such, its ontological properties as distinct from its ontological essence, always ends in metaphysical muddle, unless one realizes that the ontology of natural beings can be applied

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[1]Cf. ST. THOMAS Suppl. q. 42 art. 2 corp; ST. AUGUSTINE, De Nuptiis et Concupiscentia I, c. 16 (n. 18) P.L. 44-424; "Casti Connubii", AAS 22 (1930) 543; WERNZ-VIDAL V n. 25 with note 43; AREND, "De genuina ratione imped. impotentiae," in: Ephem. Theol. Lovanienses 9 (1932) 59. Compare also, The Book of Common Prayer, Solemnization of Marriage, Introductory Exhortation.

[2]ST. THOMAS Suppl. q. 42 art. 2 corp.; ST. AUGUSTINE, De Nuptiis et Concup. I c. 16 (n. 18) P.L. 44-424; WERNZ-VIDAL V, n. 25 with note 43.

[3]Cf. below Chap. II, p. 25.

only analogously and with restrictions to artificial entities. Marriage is in a certain sense an "artificial" entity.

Thirdly, one must keep in mind that marriage, being an institution of the moral order is really not an entity at all in the full ontological sense of that word. That is to say, it is not an ontological *substance*. The elements that constitute marriage are, ontologically speaking, accidents rather than substances, and marriage, as we shall see, if classified at all in the hierarchy of being would be only a group of accidents. Scholastic philosophy has always recognized that one can speak of the essence of an accident (or group of accidents) only in some large sense, and that to talk of the substance of an accident is to be guilty at least of metaphysical impropriety.

Taking for granted then, (since we intend to make it clear later), that marriage is a moral entity, partly dependent on God's free institution, and belonging rather to the category of accident than substance, what is the sense in which we can speak of its "essence"? What does the word "essence" mean in the title of this part of our essay?

Essence can be understood in two ways. Ontological essence is defined: Id quo res (intelligo rem physicam, naturalem, substantialem) est, quod est[4]. It is the *species completa*, and is made up of genus and specific difference,—that is, of metaphysical parts. We do not speak of essence in this sense when discussing the essence of marriage[5]. Logical essence is defined: Id sine quo res nequit existere[6]. We can speak of the logical essence of a thing with propriety even if it is only a being of the moral order, even if it is only an accident or a group of accidents, even if it is wholly or partially derived from the free institution of God or man. It is this that we are looking for and it is in this sense that the terms, essence, substance, or nature of marriage will be used from now on. And

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[4] FRICK, Ontologia n. 73.

[5] Occasionally authors speak of marriage according to this metaphysical terminology. Cf. for example MARTIN PEREZ disp. 13 sect. 10 who defines marriage according to genus and specific difference as *Conjunctio maritalis*. Such a definition however gives only quasi-metaphysical parts, as is evident, (cf. ZIGLIARA, Summa Phil. Dialect. lib. 1 c. 3 art. 2 and PALMIERI, Instit. Log. c. 4 art. 2). And it is not very enlightening as to the nature of the thing defined, since "maritalis" does not add anything to "marriage." Hence we prefer to seek the definition of marriage from another point of view. ST. THOMAS Suppl. q. 44 art. 1 queries "Utrum matrimonium sit in genere conjunctionis;" and ST. AUGUSTINE, Opus Imperf. contra Jul. lib. 5 n. XXiV P.L. 45—1461 discusses whether marriage is a *species naturae*.

[6] We take logical essence as opposed to logical accident which is defined: "Id quod in re esse potest vel ab ea abesse, salva essentia. (FRICK, Logica n. 22 e). Whatever is left when all logical accidents are removed we call "logical essence".

it has seemed worth while to make this distinction clearly and thoroughly from the start, since the neglect of it has been with some authors a cause of confusion, and a source of false argumentation.

To look for the essence of marriage means to find its definition. And since we seek the logical essence, the definition we want is one which enumerates for us all those elements and only those elements without which marriage cannot exist[7]. And to find this definition the most suitable method is one of elimination[8]. We know from history and common usage, especially from Catholic tradition and Catholic usage, what the elements are that go to make up the thing to which mankind (or at least the Christian part of it) gives the name marriage. We will make a list of all the elements of that thing which might be suspected of being in any way essential to it, and then eliminating one by one the non-essential elements, that is, the elements without which it can exist, try to arrive at the minimum but complete essential content.

In making such a list and such an analysis, our point of view is that of Catholic tradition. In other words we write as a Catholic to Catholics and so will not take the trouble to *justify* all we say on merely rational grounds. Thus in drawing up a list of the elements of marriage we will include those things which Catholic teaching and scholastic theology have commonly included, and in deciding what is non-essential and what is essential will be guided as much by official Catholic practice as by the dictates of mere natural reason. In other words this part of the essay is not so much a justification as an analysis and explanation of the Catholic concept of the essence of marriage. The official pronouncements of the Church, the Code of Canon Law, and the *common* teaching of scholastic theology, therefore, are for us a point of departure. This is the ground we have in common with those to whom we address our remarks.

The following list of matrimonial elements is derived from Sacred Scripture, the Fathers, the Theologians, Canon Law, and especially the Encyclical "Casti Connubii"[9]. The elements are arranged in the order in which they will be discussed.

1) The Sacrament, grace, mystical symbolism.
2) The contract, internal and external consent, "activa traditio corporum", union of souls.
3) The "tria bona"—"proles, fides, sacramentum".
4) Physical potency, marriage-act, remedy for concupiscence, fertility, offspring, education of offspring.

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[7] LANCELOTTO, tom. 2 tr. 9 paragr. 13 glossa k: "Ad cognoscendam substantiam alicujus actus debemus semper inspicere utrum talis actus sine illo (de quo dublo oritur) possit consistere".

[8] Cf. PALMIERI, De Matr. thes. I; Instit. log. c. 4 art. 4; and G. AREND, "De genuina ratione imped. impotentiae," in: Ephem. Theol. Lov. 9 (1932) 53, 54.

[9] AAS 22 (1930) 539.

5) Mutual help, life in common, conjugal society, cohabitation, etc.
6) The marriage bond, union, right, relation; the ends, the properties; the radical and the proximate right.
7) Conjugal love.

The first five groups will be treated in the present chapter, the sixth group in chapters II, III and IV. Conjugal love will be dealt with in chapter V[10].

1. The Sacrament, etc.

Our final problem is of such a kind that the consideration of marriage as a sacrament will not help to solve it. And since both before and after the institution of the sacrament there have been true marriages without the sacramental character, it is evident that the sacrament is not in this sense one of the essential elements.

It is true that according to the Code there cannot be a valid matrimonial *contract* among Christians which is not also a sacrament[11]. And although the Code thus refers the sacrament to marriage *in fieri*, i.e. to the contract, according to the prevalent theological view, yet the opposite opinion, that marriage *in facto esse* is a sort of *permanent* sacrament is receiving new consideration since the publishing of the "Casti Connubii". For the Pope recommends to married couples[12] that they ponder over these words of Bellarmine[13]: "The Sacrament of Matrimony can be regarded in two ways: first, in the making, and then in its permanent state. Because it is a Sacrament like to that of the Eucharist, which not only when it is being conferred, but also whilst it remains is a Sacrament; for as long as the married parties are alive, so long is their union a Sacrament of Christ and the Church"[14].

But we are concerned first of all with marriage in *general*, prescinding from its peculiarities among Christians. Hence from this point on very little will be said about marriage as a sacrament, about the grace it gives,

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[10]For other typical lists of "elements" cf. Coninck, disp. 24 dub. 1. n. 2; De Dicastillo disp. 2 dubit. 1 n. 6; Martin Perez, disp. 13 sect. 1 n. 1; Brancatus, disp. 12 art. 2 n. 8; Billuart, tom. 10 De Matrim. dissert. 1 art. 1; Estius in IV Sent. lib. 4 dist. 27 paragr. 1; Palmieri, De Matrim. thes. 1 n. 11; Huarte, n. 137.

[11]Can. 1012: "Christus Dominus ad Sacramenti dignitatem evexit ipsum contractum matrimonialem inter baptizatos. Quare inter baptizatos nequit matrimonialis contractus validus consistere quin sit eo ipso sacramentum".

[12]AAS 22 (1930) 588.

[13]Bellarmine, De Controv. tom. 3 De Matr. controv. 2 c. 6.

[14]Others who hold similar views: Sanchez lib. 2 disp. 5 n. 7; Laymann, lib. 5 tract. 10 pars 2 c. 2 n. 4; Palmieri thes. 11 ad fin.

or about the mystical symbolism by which Christ's love for the Church is represented in it[16].

2. The Contract, etc.

Marriage is distinguished *in fieri* and *in facto esse*. Marriage *in fieri* is the *act or acts* by which the parties become married, and marriage *in facto esse* is the resulting *state* of marriage in which they find themselves. To metrimony *in fieri* must be referred the elements of the contract, the internal and external consent, the "activa traditio corporum" and the union of souls. The internal and external consent are simply another name for the contract, as is also the "activa traditio corporum"[16]. The union of souls is an element which can be considered as belonging to the contract, too. Hence we will speak first of union of souls, then of the contract.

The element union of souls has been mentioned here because in the "Casti Connubii" it is taken to refer to consent. The encyclical, after stating that the individual marriage comes into being as a result of a free and deliberate act of the will which cannot be supplied by any human power, goes on to say[17]: "By matrimony, therefore, the souls of the contracting parties are joined and knit together more directly and more intimately than are their bodies and that not by any passing affection of sense or spirit, but by a deliberate and firm act of the will; and from this *union of souls* by God's decree a sacred and inviolable bond arises". There is a sense, too, in which this consent, this union of souls can be called love: "Consent is the union of two wills with regard to the same thing; therefore a union of souls. But can it be called love? Is there not such a union of souls in every contract?—and yet no one would assent that in every contract, for example buying and selling, the contracting parties love one another. This is true, but one must deny the parity. For matrimonial consent differs greatly from other contracts by its *object*. A man and woman deliberately and freely *give themselves to one another* for a complete intimacy of their whole life, an intimacy both bodily and interior, and this forever, and exclusively. Such a surrender, if considered fully in itself, cannot but suppose, at least a certain inchoate and imperfect love; while the free consent to that surrender is an external expression of that internal love,—is the love itself"[18].

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[16]See below Chap. II p. 36 for the sacrament considered as one of the *tria bona* of marriage. On the mystical symbolism of marriage cf. St. Augustine, De Bono Conjugali c. 7 (n. 7) P.L. 40—378; In Evang. Joan. tr. 9 n. 2 (cap. II) P.L. 53-1459; "Casti Connubii" AAS 22 (1930) 552; Karl Adam, Die Sakramentale Weihe der Ehe p. 8 sq.

[16]Thus for instance Coninck, disp. 24 dub. 1 n. 2.

[17]AAS 22 (1930) 542.

[18]Zeiger, S.J. "Nova Matrimonii Definitio?" in: Periodica etc. 20 (1931) 49.* For a development of the same idea with regard to marriage as a permanent state see below Chap. V, p. 75.

But in addition to the union of souls, and love, which are implied in matrimonial consent, its contractual nature must be here taken into account.

Although marriage in Roman Law did not have a strict contractual nature[19], yet from very early times it has been considered a contract in the Canon Law. During the last century a fervid controversy waged, especially among doctors of the civil law, as to whether or not matrimony was really a contract[20]. And even among Catholic doctors there were some who denied the contractual nature of marriage[21]. But for Catholics, the controversy (insofar as it existed), has been settled by the Code[22]. In fact the whole history of Canon Law is so bound up with the idea that marriage is a contract that it would be utterly impossible to reconcile the opposite opinion with traditional ecclesiastical jurisprudence.

It is evident furthermore on intrinsic grounds that matrimony is a contract. As CHELODI says[23]: "In eo omnia elementa invenimus contractus bilateralis qui est: 'duorum pluriumve in idem placitum consensus' (fr. 1, paragr. 2 D 2, 14), sc. contrahentes, objectum, consensum obligationem inducentem in utraque parte, ex justitia commutativa, aliquid faciendi vel omittendi"[24]. However one must always keep in mind that it is a contract *sui generis* on more than one count. It is divine in origin and man cannot

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[19]JOYCE, S.J., Christian Marriage, p. 42 and p. 67 note 1: "Though Marriage is not termed a contract in Roman Law, its contractual aspect is extremely prominent in the treatment accorded it". But cf. BIDAGOR, S.J., "Sobre la naturaleza del matrimonio en S. Isidoro de Seville," in: Miscellanea Isidoriana p. 258: "El Matrimonio romano se caracterizaba precisamente por la *affectio maritalis*, que es voluntad actual y perseverante de vivir marido y mujer, en común formando una familia. . . . . Entanto existía matrimonio, sobre todo en el derech clásico romano, en quanto perduran el affecto y el propósito de ser marido y mujer. . . . . " etc.

[20]LEBRAS, "Mariage," in: Dict. de Théol. Cath. vol. 18, col. 2288 sq. gives the best account of this controversy, together with the literature.

[21]For instance: KLEE, p. 2 "Die Ehe ist kein Vertrag." And he praises HEGEL for rejecting as shameful KANT'S definition of marriage as a contract; LAURIN, Introductio in Jus Matrimoniale (Vindobonae 1895), p. 28 sq. is quoted by CHELODI p. 2 note 2, to the effect that marriage is not a contract; SCHERER vol. 2 p. 92 says that marriage, at least *in facto esse*, is not a contract, but admits it comes into being as the result of a contract. Cf. WERNZ-VIDAL V n. 34 note 66. See below Chap. IV p. 64 for the sense in which marriage *in facto esse* is a contract.

[22]Can. 1012 etc.

[23]CHELODI, n. 2.

[24]Cf. also WIRCEBURGENSES V, De Matr. c. 2 art. 1 n. 263; WERNZ-VIDAL V, n. 34; Vlaming I, n. 9; MERKELBACH III, n. 756; LINNEBORN, paragr. 2 n. II (p. 50).

change its constitution[25]. The consent given to it is not revocable even if both parties agree.

Formerly it was debated whether the essence of matrimony was the *contract* or the *bond* i.e. matrimony *in fieri* or *in facto esse*[26]. BRANCATUS tells us that in his time canonists generally spoke for the contract, while the theologians favored the permanent bond[27]. But the importance of the debate should not be overestimated. In the first place it is evident that marriage *in fieri* and marriage *in facto esse* are two different (really distinct) things. For the former is the cause of the latter[28]. And so if marriage is looked at only *in fieri* then the contract is certainly essential to it;—the contract *is* marriage *in fieri*; if marriage is looked at merely *in facto esse* then the contract is essential to it only as its efficient cause, not as a constitutive element[29]; and finally if marriage is looked at as a whole, that is, as including the two aspects *in fieri* and *in facto esse* then both contract and bond are essential to it, and the question resolves itself into a dispute about a name: scil. which deserves the *name* matrimony *per prius et essentialiter*, the contract or the bond? And this was the question which the authors were really discussing. The merits of such a controversy, at all events obsolete, need not detain us[30].

It is clear then that the elements of contract, internal and external consent, "activa traditio corporum", and union of souls are all essential that matrimony begin to exist, for they are its efficient cause, but since they are not constitutive elements of the permanent state of matrimony we will say no more about them. For it is the essence of marriage *in facto esse* that is at present the object of investigation.

3. THE "TRIA BONA"

The "*tria bona*"—offspring, conjugal faith, and the sacrament—have held such a large place in the Christian theology of marriage from St.

[25]"Casti Connubii" AAS 22 (1930) 541.

[26]It may be noted that the Code uses the term "matrimonium" both of the contract, as in can. 1110, and of the *state* of marriage, e.g., can. 1013 and passim.

[27]BRANCATUS, disp. 12 art. 2 n. 13.

[28]EUGENE IV, Decretum pro Armenis, Denzinger n. 702: "Causa efficiens matrimonii regulariter est mutuus consensus per verba de praesenti expressus".

[29]PALMIERI, De Matr. thes. 1 n. V (p. 7).

[30]We agree with the following authors that the name matrimony belongs primarily to the bond not to the contract: MARTIN PEREZ, disp. 13 sect. 1. n. 4; MASTRIUS, In IV Sent. lib. 4 disp. 7 art. 1 n. 2, who argues from the Council of Trent (c. 1 de reform. matr. sess. 24 sq., Denzinger n. 969 sq.) where the term matrimony is used primarily of the bond, and cf. EUGENE IV, Decretum pro Armenis. Denzinger n. 702 where the *bond* is called matrimony; PALMIERI, Thes. 1 n. V. (for the sense in which the contract can be called matrimony); MERKELBACH III. n. 757 and 711.

Augustine[31] to the "Casti Connubii"[32] that they cannot be passed over. But since each of them coincides with one or more of the elements to be treated below, we need not treat them separately here.

Thus offspring, the primary good or benefit of marriage according to St. Augustine is the primary *end* of marriage according to the Code[33]. Conjugal faith, according to ST. AUGUSTINE and the "Casti Connubii" includes the elements of conjugal chastity, the unity of marriage, and well ordered conjugal love. The unity of marriage (with its consequent exclusivity and conjugal chastity) is considered in the Code[34] as an essential property of marriage, which we will treat in its proper place. Of conjugal love, too, more anon. The "sacrament" to ST. AUGUSTINE meant the indissolubility *special* to Christian marriage because of its mystical significance[35], and according to "Casti Connubii" includes also the grace-giving sacrament of the New Law[36]. We have already noted[37] that the consideration of marriage as a grace-giving sacrament, and as a mystical symbol is not to our purpose. But inasmuch as indissolubility is a characteristic, (to a greater or lesser degree), of all true marriages in the present order, we will speak of it below as it is taken in the Code[38], namely as one of the essential properties of marriage.

4. OFFSPRING AND REMEDY FOR CONCUPISCENCE

We have grouped under this heading the following elements: a) physical potency; b) the marriage act; c) the remedy for concupiscence; d) fertility; e) offspring and education of offspring;—and will say something about each. It will be quite clear that none of them is essential to marriage in the sense that without them marriage could not exist. We are speaking of these elements as actually existing, of course, not as *implied* in matrimony, nor inasmuch as matrimony may be essentially related to them as *ends*. We mean merely that the individual marriage can exist without any of these elements being actually realized.

a) *Physical potency.* At first glance, since potency is understood as the opposite of impotency, one may be tempted to say this at least is

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[31] De Bono Conjug. c. 3 (n. 3) sq. P.L. 40—375; c. 24 (n. 32) P.L. 40—394; De Nupt. et Concup., I, c. 4 (n. 5) P.L. 44—415; I, c. 10 (n. 11) P.L. 44—420; and especially I, c. 17 (n. 19) P.L. 44—424; I, c. 21 (n. 25) P.L. 44—427.

[32] AAS 22 (1930) 543 sq.

[33] Can. 1013 § 1.

[34] Can. 1013 § 2.

[35] De Bono Conjug. c. 7 (n. 6 and 7) P.L. 40—378; In Evang. Joan. tr. 9 n. 2 (c. II) P.L. 35—1459; and cf. note 15 above.

[36] AAS 22 (1930) 550 sq.

[37] Above p. 12.

[38] Can. 1013 § 2.

essential, since it is a prerequisite for consent to the *jus in corpus*[39]. But holding strictly to our definition of what we mean by essence, namely "that without which marriage cannot exist", we must say that physical potency is not an essential element. For supervenient impotency does not destroy the marriage bond[40]. Hence there can be real marriage even where there is no physical ability to perform the marriage act[41].

b) *The marriage act.* There have been theologians in the past who claimed that the actual use of the conjugal act was essential to marriage. "Thus JULIAN THE PELAGIAN, HINCMAR OF RHEIMS, ALGERUS LEODIENSIS, GRATIAN and many canonists especially of the school of Bologna; among whom MAGISTER ROLANDUS;—against the theologians especially of the Paris school, with PETER LOMBARD, who taught that marriage was constituted merely by mutual consent. But when ROLANDUS was made Pope under the name ALEXANDER III, he approved substantially the doctrine of the Paris school, but in accordance with the opinion of Bologna established that a *matrimonium ratum et non consummatum* is not perfectly indissoluble"[42]. The latest among Catholics to hold that the copula is essential was DR. JOSEPH FREISEN, who, however, in the second edition of his work retracted this opinion[43]. The opinion is now obsolete, and indeed, as FREISEN himself points out in his retraction, could hardly be reconciled with the common teaching that the Blessed Mother, though always a virgin, was truly married. The Code takes for granted that actual use is not essential as did also the Council of Trent[44]. The citations from various

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[39]Cf. can. 1068.

[40] This is Catholic doctrine and the universal interpretation of can. 1068.

[41]This point raises a difficulty which we will treat below, Chap. VIII p. 117. It will scarcely be argued seriously that in the case of supervenient impotency the marriage continues to exist because of a relation back to the previously existing potency. In other words, one cannot argue as follows: such a marriage is not in existence without *any* physical potency, because it once *had* potency. For besides the absurdity involved in the notion of contractual rights and obligations now existing with regard to an object which now does not exist, there is also the difficulty that the *jus radicale* (which we will show to be the essence of marriage), must be perpetual; and therefore its essential constituents must be perpetual. A previous physical potency that now no longer exists cannot be an essential part of a right which of its nature is perpetual.

[42]MERKELBACH III, n. 750 ad fin. Cf. Joyce, p. 54 sq. for summary of Hincmar's teaching that copula is essential to marriage.

[43]Introduction p. xxiv.

[44]Can. 1015 § 1; and cf. Council of Trent, Sess. 24 canon 6: "Si quis dixerit matrimonium ratum non consummatum per solemnem religionis professionem alterius conjugum non dirimi, A. S." (Denz. n. 976).

Fathers which seem to point in the other direction, whatever may have been their original meaning, are not accepted any longer[15]. This point is so evident that we need waste no time on it.

c) *Remedy for concupiscence.* When marriage is said to be a remedy for concupiscence this does not mean that marriage has the power of extinguishing or even of diminishing sexual desire. It does not even mean that marriage directly circumvents the possibility of inordination in sexual matters. But it means first, that marriage gives *legitimate* scope to sexual desire; second, that inasmuch as it imposes the obligation of marital chastity, it acts as a restraining influence on the partners in their dealings with one another, and forbids all indulgence outside marriage; thirdly, it indirectly forestalls inordination through the grace of the sacrament, and also psychologically.

And this last in three ways: first, the work of procreation is ennobled in the minds of the partners because in it they make real for themselves the central fact of marriage, namely that they *belong* to one another, that they have made a self-sacrificing surrender of their persons to one another, that they have given up to a large extent their individual lives in the interest of that common life which is marriage. As the ritual admonition says[16]: "And so you begin your married life by the voluntary and complete surrender of your individual lives in the interest of that deeper and wider life which you are to have in common. Henceforth *you will belong entirely to each other*, you will be one in mind, one in heart, one in affections". The marriage act understood as the culmination of such a surrender cannot but be ennobled in the minds of the partners. Secondly, the fact that the marriage act is essentially an act of *parenthood* likewise lifts it from the animal sphere of concupiscence and makes it a truly human act. As AUGUSTINE says: "Deinde (bonae sunt nuptiae) quia reprimitur et quodam modo verecundius aestuat concupiscentia carnis quam temperat parentalis affectus. Intercedit enim quaedam gravitas fervidae voluptatis cum in eo quod sibi vir et mulier adhaerescunt, pater et mater esse meditantur"[17]. Thirdly, marriage circumvents sexual inordination psychologically by lessening the enticing curiosity which for fallen nature seems to be attached to pleasures simply because they are illicit[18].

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[15] Cf. PESCH, Praelect. Dogm. VII, n. 734 for opposite proof from the Fathers.

[16] This is from "Instruction before Marriage" read at the altar to couples about to be married in the United States. Cf. The Priest's New Ritual, p. 207.

[17] De Bono Conjug. c. 3 (n. 3) P.L. 40—375.

[18] Sometimes one hears the complaint that to make marriage a "remedy for consupiscence" is to degrade it;—but this complaint is due either to a misunderstanding of the meaning of that remedy, or to a refusal to face the facts of human nature.

It is clear then from this explanation of the meaning of the remedy for concupiscence that it is for the most part an aspect or formality of the marriage act itself. Hence in this sense it is no more essential to marriage than the copula. Inasmuch as the remedy of concupiscence signifies the obligation of conjugal fidelity or the exclusivity of marriage it is an aspect of the *unity* of marriage—an essential property to be treated below. And finally inasmuch as it is an essential *end* of the institution of marriage we will also speak of it later.

That there actually be in any marriage a successful remedy for concupiscence is of course not essential to the existence of the marriage.

d) *Fertility.* This is the opposite of sterility and is sometimes described as the "expedita potestas physica ad *generandum*[49]. Since sterility is neither an impedient nor a diriment impediment of matrimony[50], and since those married people who have no children are none the less married on that account, it is clear that fertility is not essential to marriage in any sense. And this has been the uninterrupted tradition of the church[51].

e) *Offspring and its education.* Since the actual marriage act and actual fertility are both non-essential, it is obvious that actual offspring and its education are likewise non-essential. We will speak of this point again however, when we come to treat of offspring and its education as the primary *end* of marriage.

5. Mutual Help, etc.

Although in some discussions of marriage one is likely to get the impression that the *jus ad actum conjugalem* exhausts its definition, in the mind of the public the strictly sexual relationship is only one of the many elements that constitute marriage. We are not particularly concerned with the mind of the public except insofar as common sense is a good guide-post to philosophical truth. But both common sense, philosophy, and theology agree in giving to *mutual help* an important place in matrimony. The

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[49]Palmieri, De Matr. thes. I n. II (p. 3).

[50]Can. 1068 § 3 "Sterilitas matrimonium nec dirimit nec impedit".

[51]G. Arendt, S.J. has defended a theory according to which organic (not functional) sterility which is known to the contracting parties beforehand makes marriage invalid for want of consent,—which according to him should include an "intentio prolis saltem praesumptive possibilis". Cf. for example, Ephem. Theol. Lov. 9 (1932) 422 where he defends this theory against exceptions taken by G. Arend, whose article: "De genuina ratione imped. impotentiae," had appeared in Ephem. Theol. Lov. 9 (1932) 28 sq. especially p. 50. On this theory see also Vermeersch, Theol. Mor. IV n. 46 (p. 42). Since we hold that there is no need to intend even the copula (see below Chap. IX) in order that consent be valid, it follows *a fortiori* that no intention of generation is required.

Code, also, does not neglect to mention it as one of the secondary ends of marriage.

Before asking whether mutual help is essential to marriage one should consider the prior question, what is essential to mutual help? In other words what is the essential content of the concept "mutual help"? Let us describe at least in a general way the ideas commonly included under this concept.

Mutual help implies principally the *life-partnership* which gives to the spouses that spiritual, physical, psychological, and even economic completion which only the opposite sexes can give one another. The sexes *de facto* complement one another in all these fields. And to say that mutual help is an end of marriage means that marriage as an institution is aimed at this reciprocal life-completion of the sexes. Not the least important element of this reciprocity is the fact that by mutual help the partners form an adequate principle for the *education* of the children God may send them. Hence it generally includes the ideas of *cohabitation*, life *in common*, and conjugal *society*. (We will inquire later in what sense it includes conjugal *love*). These expressions are not exactly synonymous and are used in many varied senses[a]. Sometimes "conjugal society" is simply another name for marriage itself and thus includes the sexual relationship. So also the expressions "cohabitation" and "life in common" sometimes mean merely life in the same house, sometimes include the sex-relationship, and sometimes indicate the life-partnership of the spouses, as distinct from their sex-relationship[b].

Now, although all these ideas are generally included under the one term "mutual help", it does not follow that all of them are essential to it considered as an end of marriage, or as an element of a marriage. But it is not to our purpose here, (nor would it aid in solving the final problem) to determine accurately just what is essential to the concept and what is not. For our problem deals rather with the relation of the marriage act to marriage, than the relation of mutual help. Hence for our purposes it suffices to say that mutual help means the *life-partnership* of the spouses as distinct from the sex-partnership—without saying more particularly what are the essential elements of that life-partnership. We say only one thing of it. It adds *something* over and above the sex-relationship to marriage. If it does not include essentially all the ideas above mentioned, it includes at least some one of them. Hereafter then, when we speak of

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[a] Cf. "Casti Connubii" AAS 22 (1930) 549: "Matrimonium. . . . . *latius* ut totius vitae communio, consuetudo, societas, accipiatur". On the interpretation of this passage see below Chap. V note 67.

[b] Compare the following definition of marriage: "Die rechtmässige Verbindung von Mann und Weib zu gegenseitiger LEBENS- UND LEIBESGEMEINSCHAFT". (KNECHT p. 37). Our concept of mutual help is the "Lebens-" as distinct from the "Leibesgemeinschaft".

mutual help we will mean the life-partnership of the spouses taken in general and inasmuch as this is an element of matrimony distinct from and added to the sex-relationship[44].

And of mutual help thus understood we ask: Is it essential to marriage?

Whether it is an essential *end* of marriage will be answered in the affirmative in the next chapter.

But as far as actual mutual help is concerned, that is to say, the *acts* of mutual help, it is quite clear that they are not essential to marriage. They are no more essential than the actual use of marriage. Only confusion and absurdity would come of denying this. If they were essential they would have to be perpetual,—for the married state, as will appear, has perpetuity as an essential property,—and from this it would follow that as soon as actual mutual help ceased (as in a case of *separatio a thoro et mensa*) the marriage would cease to exist. Just as marriage exists without the marriage act, so it can exist without the acts of mutual help.

Consequently there can be no dispute on this point. And when one encounters discussions whether or not cohabitation is essential to marriage, or only necessary to its integrity, one notes immediately a confusion between the two ideas—*acts* of mutual help, and the *right and obligation* to these acts[45]. Perhaps there is room to dispute whether the *right* to the acts of mutual help is essential to marriage, or only necessary for its integrity,—but as to the acts themselves there can be no doubt. They are non-essential[46].

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[44]This does not deny of course that the mutual help is *implied* in the sex relationship. For the primary end of marriage is not only the procreation but the *education* of children. Hence it implies the necessity of at least some acts of mutual help. But we mean that the acts by which mutual help is realized are distinct from and added to the sexual acts of marriage. In other words we do not reduce the acts of mutual help merely to the marriage act itself. The marriage *act* and the *acts* of mutual help are different things. Hence we would not agree with the opinion that mutual help (or "vitae consuetudo") consists *essentially* in the marriage act (or the right to it) and nothing else. Cf. WERNZ-VIDAL. V n. 34; CAPPELLO De Matr. n. 6.

[45]Cf. for example, MERKELBACH III, n. 746 ad fin.; PICO, n. 123: "La comunanza o *consuetudo vitae* e cioè la *communio thori, mensae et habitationis* riguarda piuttosto l'integrità che non l'essenza del matrimonio. . . . . " etc.; CAPPELLO De Matr. n. 6.

[46]And we shall see below that the *right* to acts of mutual help is essential; just as essential as the secondary end which we call mutual help.

CHAPTER II.

THE ESSENTIALS OF MARRIAGE IN GENERAL

By a process of exclusion we have arrived at a point where there remain for consideration the following elements of marriage: the marriage bond (also called the marriage union, marriage right, marriage relation), the ends of marriage (procreation and education of children, remedy for concupiscence, mutual help), the properties of marriage (unity and indissolubility) and conjugal love. We will treat conjugal love in a separate chapter, and so say no more about it here. Thus we have the *bond*, the *ends*, the *properties* of marriage. In the present chapter therefore we will discuss: I, the essential *bond;* II, the essential *ends;* III, the essential *properties;* and finally, IV, make a brief comparison of the bond, ends, properties and "benefits"[1].

I.

With regard to the bond of marriage theologians are practically unanimous in giving us the following points: a) The essence of marriage is the marriage bond (*vinculum*). b) The essence of marriage is the marriage union (*conjunctio*). c) The essence of marriage is the marriage right (*jus in corpus*). d) The essence of marriage is the marriage relation. It is true that not all authors say all four of these things explicitly when telling us what is the essence of marriage. But these four points are implicit in the common teaching and, properly explained, combine to form a doctrine from which hardly anyone would dissent[2].

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[1]The authorized translation of the "Casti Connubii" calls the *tria bona* of ST. AUGUSTINE the "three benefits" of marriage.

[2]ST. THOMAS Suppl. q. 42 a. 4 corp; q. 44 a. 1; q. 49 a. 3; ST. BONAVENTURE in IV Sent. lib. 4 dist. 27 art. 1 q. 1; BELLARMINUS III De Matr. c. 14 ad fin.; *Catechismus Romanus* (Cat. Conc. Trid.) De Matr. Sacr. in initio; ST. ALPHONSUS Theol. Mor. IV De Matr. n. 879; SALMANTICENSES, Curs. Theol. Mor. tr. 9 De Matr. c. 3 punct. 1 n. 3; WIRCEBURGENSES V De Matr. n. 263; CONINCK disp. 24 dub. 1. n. 3; ESTIUS In IV Sent. lib. 4 dist. 27 paragr. 1; AVERSA De Matr. q. 2 sect. 1; CLERICATUS Decis. 1. n. 1; MASTRIUS In IV Sent. lib. 4 disp. 7 q. 1 art. 1 n. 2 and 3; BRANCATUS disp. 12 art. 3 n. 16 and 18; BARBOSA tom. 2 in lib. 4 Decret. tit. 1 n. 7; MARTIN PEREZ disp. 13 sect. 3 n. 2; sect. 5 n. 4; REBELLUS pars 2 lib. 2 q. 13 sect. 4 n. 30 "quarto"; BILLOT De Sacr. II, p. 330; PALMIERI De Matr. thes. 1 n. IV; BALLERINI-PALMIERI tom. 6 De Matr. n. 227; BUCCERONI IV De Matr. sect. 2 n. 958; VAN DER BURGT pars 1 c. 1 n. 3; LÉPICIER De Matr. q. 1 art. 3 n. 2 p. 18; q. 5 art. 4 n. 3 p. 105; MARC-GESTERMANN II, n. 1963; HUARTE n. 141; HUTH tit. 1 sect. 2 paragr. 1; AERTNYS-DAMEN II, n. 623; HEISS p. 3; PAYEN I, n. 75 ad fin.; VLAMING I, n. 15, II; KNECHT p. 38; MERKELBACH III, n. 755; CAPPELLO n. 7; etc.

For the four points are merely different ways of speaking of the same thing. The ideas coincide. PAYEN sums up the common teaching in the following fourfold definition of the essence of marriage[3]: "It is 1) the exclusive and perpetual union for the procreation of children; 2) the matrimonial bond; 3) the exclusive and perpetual right, considered radically, to conjugal acts; 4) a mutual and real relation". And he goes on to say: "Rightly understood, that is, taken for the essence of marriage *in facto esse*, these four definitions come to the same thing".

It is readily understood that the ideas "marriage union" and "marriage bond" coincide. The philosophical definition of society runs as follows: Junctio plurium entium intelligentium in commune bonum suis viribus actu vel habitu conspirantium. And the explanation of the definition: *Conspirantium actu*—quando unio ista constat ex actuali cooperatione, ut in societate transitoria; *conspirantium habitu*—quando unio ista constat ex aliquo vinculo morali, quod vinculum est principium morale permanens ipsius unionis habitualis et principium radicale unionis prout actu tendit in finem societatis. Hoc principium, saltem in societate naturali, constat ex iuribus et officiis mutuis tum societatis erga membra tum membrorum erga societatem[4]. Accordingly to say that the marriage union is the marriage bond is merely to assert that the matrimonial society has as its formal element a permanent moral principle of union—which can be called the union or the bond indifferently.

Likewise the ideas marriage bond and marriage right coincide. For as we just saw, the permanent moral principle which is the formal element, or bond, of a natural society consists in the rights and duties of the members. ST. BONAVENTURE tells us[5]: "Illa autem cunjunctio quae respicit totum conjunctum et est matrimonium essentialiter non est affectio animorum, vel approximatio corporum sed quoddam *vinculum* obligatorium quod non perimitur sive affectu sive corpore separentur". This is the *jus in corpus* which the authors identify with the bond and with the union[6]. And we note in passing that though we generally speak of this right in the singular it is really a group of rights and corresponding obligations, as will appear.

It is necessary to call attention also to the familiar distinction between the proximate and radical right in marriage. It is only the radical right which is essential,—which *is* the essence. For in actual married life there are many occasions when the right to the conjugal act seems to disappear.

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[3]PAYEN I, n. 70 sq.

[4]Cf. for example, MACKSEY p. 412 sq. for a similar explanation.

[5]In IV Sent. lib. 4 dist. 27 art. 1 q. 1.

[6]Cf. above, note 2. E. g. MASTRIUS in IV Sent. lib. 4 disp. 7 q. 1 art. 1. n. 3; BELLARMINE III De Matr. c. 14 ad fin. (p. 808); BALLERINI-PALMIERI De Matr. n. 227; AVERSA De Matr. q. 22 sect. 1; BRANCATUS disp. 12 art. 3 n. 16; KNECHT p. 38.

For instance, when the husband commits adultery he loses the right to the marriage act. And his wife has no obligation to render it. If he forces her he commits a sin of injustice. There are also other cases where the right seems to disappear: a vow of chastity, public or private, sickness of one or both of the parties, supervenient complete impotence, etc.[7]. Yet the marriage bond which consists essentially in the *jus in corpus* is not destroyed by adultery nor by anything else except death.

It is necessary to distinguish, then, the right in virtue of which the parties can here and now exercise legitimately and justly the marriage act, and another right more remote and fundamental which perseveres until death, even when the former for some reason is impeded or interrupted. Theologians call this latter right the *radical* marriage-right, and the former the *proximate* right. By the proximate right, then, is understood the unimpeded power of exercising conjugal acts; and this right is perfectly intelligible. But the notion of a radical right is at first sight obscure. It seems strange that a person can be said to have any kind of a commutative right to acts which here and now he cannot exercise without injustice. Consequently in a later chapter we will attempt to clarify further the familiar distinction and indicate more accurately the *meaning* of the phrase "radical right" in marriage. For the moment it suffices to say, with the common teaching, that the radical right is the essence of marriage.

Finally the ideas "marriage right" and "marriage relation" coincide. It is not immediately evident in what sense this can be true. Hence in the following chapter we will analyze the notion of a right, and apply our findings to marriage considered as a relation, thus completing the synthesis of the four ideas: bond, union, right, relation.

The essence of marriage then, according to common teaching, is the marriage bond. But this bond is not sufficiently understood unless we regard also its essential ends and essential properties.

II.

Just as there is unanimity among the theologians in declaring the bond to be the essence of marriage, so also they are agreed in assigning the ends for which that exclusive and perpetual bond exists. The doctrine is laid down in canon 1013 § 1: "Matrimonii finis primarius est procreatio atque educatio prolis; secundarius mutuum adiutorium et remedium concupiscentiae". The Code does not say in so many words that these are

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[7] WERNZ-VIDAL V, n. 599. In the old law the parties could not demand the marriage act as a right for the first two months after marriage. This *privilegium bimestre*, granted for the purpose of allowing the parties to deliberate about entering religion, is abrogated in can. 1111: "Utrique conjugi *ab ipso matrimonii initio* aequum jus et officium. . . . . " etc. Cf. below Chap. VII.

essentiol ends of matrimony. But there is no doubt about the trsditional theological opinion on the point. No one of course, would question that the primary end is intrinsic and essential to marriage[8]. And as for the secondary ends the usual doctrine is given by CAPPELLO[9]: "Finis secundarius item *essentialis* et *operis* eat mutuum *adiutorium* non solum in cura rei domesticae, sed praesertim in mutua dilectione et in prolis educatione, iuxta illud: 'Focinmus ei adiutorium simile aibi'[10], et *remedium concupiscentiae*. . . . . quatenus ad illicita non provocat concupiscentia, si per actum coniugalem ei licite satisfit, secundum illud Apostoli: 'quod si non se continent, nubant: melius est enim nubere quam uri.' "[11] The authors agree in general that these secondary ends are intrinsic and *essential*, so that *de facto* in the present order of things morriage connot exist without being *ipso facto* related to these three ends[12]. The partners in marrying may, of course, have any number of ends in view in making the contract. But marriage itself, the thing they consent to, cannot exist without being objectively ordered to the three essential ends—procreation and education of children, remedy for concupiscence and mutual help.

Now what does it mean in the concrete, to say that the marriage bond in a given case has these three essential ends? An end is a good to be produced or acquired. And one can underatand how marriage in general, considered as an institution, is calculated to produce these three things. But since we have seen that the actual realization of these ends is not

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[8]The procreation and education of children is called the primary end of marriagc not precisely because it is morc *essential* than the secondary ends—for all are equally essential in the present order—but becausc it is more *fundamental*. In other words it necessarily includes the other two enda to a certain extent, whereas they do not necessarily include it. The remedy for concupiscence is included in the marriage act, and the necessity for mutual help is involved in the obligation of educating the offapring. Cf. ST. THOMAS Suppl. q. 49 art. 2 ad I; PALMIERI De Matr. thes. 2 n. V; VERMEERSCH Theol. Mor. IV, n. 41; TIMLIN p. 75; G. AREND: "De genuina ratione imped. impot." in: Ephem. Theol. Lov. 9 (1932) 56 sq. In the "Casti Connubii" AAS 22 (1930) 548 we are told that if marriage is looked at in a *broad sense* then "haec mutua coniugum interior conformatio, hoc assiduum sese invicem perficiendi studium verissima quadam ratione ut docet Catechismus Romanus etiam *primaria* matrimonii *causa et ratio* dici potest". For the interpretation of this passage see below Chap. V note 67.

[9]De Matr. n. 9.

[10]Gen. II, 18.

[11]I Cor. VII, 9.

[12]WERNZ-VIDAL V, n. 26; NOLDIN, Theol. Mor. III, n. 504; CAPPELLO De Matr. n. 9; MERKELBACH III, n. 752; etc. The authors either say explicitly that all three ends are essential or else say all three ends are *fines operis* which amounts to the same thing.

essential to any individual marriage—so that marriage can still exist when the ends are not and cannot be realized, what meaning is there in saying that these ends are essential in the case of a given individual marriage?—for instance in a marriage which has failed and in which the partners are separated completely and forever. In what sense is such a marriage bond objectively ordered to its essential ends?

In such a case (and in all cases) the marriage bond is ordered objectively to the ends of marriage simply because it is a "vinculum obligatorium"—to use St. Bonaventure's expression. That is, it is a bond consisting of rights and duties. *And these rights and duties regard the acts by which the ends of marriage are realized.* Thus the marriage bond is said to be a "jus in corpus in *ordine ad actus conjugales*". In other words the rights which make up the marriage bond are the rights to perform the acts by which the ends of marriage are actualized and produced. And the obligations which correspond to these rights are the obligations to perform the same acts. Thus the individual marriage is always objectively related to the primary end *procreation*, inasmuch as the marriage bond always consists in a right to marital intercourse, by which the primary end is realized. Hence even in a case where the partners do not actually make use of their right, or do not intend to have any children, yet since they always have the right to those acts, since the marriage *consists* in the right to such acts, their individual marriage is always essentially related to the primary end.

But it must always be kept in mind that the right in question is only a radical right, which perseveres even when the proximate right to these acts is gone,—about which distinction more will be said in a later chapter.

To us it seems then, to be a clear and immediate implication in the doctrine that *all three* ends are essential to marriage, that the marriage bond consists in the radical right to acts by which *all three* ends of marriage are realized. If the marriage bond is not such a right, which extends not only to the acts by which the primary end is realized, but also to the acts of the secondary essential ends, in what possible sense can one call these secondary ends *essential* to the marriage? We hold therefore, that the bond of marriage is a radical right not only to the sexual act by which the primary end, and the remedy of concupiscence are realized, but it is also a radical right to the acts of mutual help. Hence when we say that the essence of marriage is a "jus in corpus in ordine ad actus conjugales", we mean by "actus conjugales" not only the sexual act, but all the acts essential to conjugal life, that is all the acts by which the three essential ends are realized.

And so to the question: What are those conjugal acts, the radical right to which is essential to marriage?—we answer: They are the acts by which the *three* essential ends are realized—and more particularly:—

1. *The Marriage Act itself.* No one will object to this statement.—

it is the explicit common teaching of the theologians. Therefore there is no need to justify it, but we mention briefly two other points connected with it. First, this same act which realizes the primary end, procreation, also realizes the secondary end, remedy for concupiscence, at least on its positive side[13]. Secondly, the right to the marriage act imposes on the partners a further *hypothetical* obligation, which is essential to marriage and which is involved in the right to the copula. For the primary end of marrioge is not only the procreation but also the *education* of offspring. Therefore an obligation to educate the children *if* intercourse results in conception, is essential to marriage. It should be noted with regard to this obligation that it is not one which the partners have *towards one another*. Their obligations and rights toward one another with regard to the education of possible offspring are part of the rights and duties of mutual help. But it is an obligation toward the child itself. Hence the right that corresponds to it is the right the child has to be educated. Therefore one understands that this obligation is not part of the bond that binds the spouses to one another, except inasmuch as it is a consequence of their mutual right to the marriage act.

Just as we do not attempt to determine in particular which acts of mutual help are essential to its concept, so we will not attempt here to delimit the acts which essentially constitute the education of the offspring inasmuch as this education is an end of marriage. For the solution of neither the one nor the other problem will help us in our own investigation. And with regard to education there is no unanimity about what is essential; —as one can see merely by reading the various opinions on the question: What conditions against the education of the children, invalidate? Some have gone so far as to say that not even a condition of aborting all the offspring invalidates marriage[14]. Others have gone so far in the other direction as to say that a condition to raise the children in heresy or to a life of crime does invalidate[15]. Canon 1113 lays down that the parents are bound by a most serious obligation to look after the religious, moral, physical, and civil education of the children. But it can hardly be maintained today that each of these particulars is so essential that a condition against any one of them would invalidate marriage. Hence it would be going too far to say that all of these belong to the notion of education looked at as an essential end of marriage,—even among Christians. And so

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[13]Negatively, remedy for concupiscence implies abstention from sexual acts outside the limits of marriage. In this sense the remedy is consequent upon the exclusivity of the marriage bond and is the realization of the obligation to marital chastity. Cf. "Casti Connubii" AAS 22 (1930) 546 sq.

[14]E. g. DE SMET n. 155; VROMANT, Jus Miss. n. 175; VERMEERSCH-CREUSEN, Epit. Jur. Can. II (3rd edit.) n. 381.

[15]WERNZ-VIDAL V, 518 note 32 gives the literature.

without attempting to determine what is the education of the offspring that marriage essentially demands, we content ourselves with saying in general that the obligation to education, if intercourse results in conception, is essential to marriage[16].

2. *The acts of mutual help.* We said above [17] that "perhaps there is room to dispute whether the *right* to the acts of mutual help is essential to marriage". For though theologians give the data from which one would naturally conclude that the radical right to such acts is essential, yet the conclusion itself is not so universal nor explicit in the theological tradition as the doctrine about the right to the marriage act. Some have taken "jus in corpus in ordine ad actus conjugales" to mean the right to the marriage act and nothing more[18]. And although this question is not absolutely necessary to the present thesis[19], yet since it is an important question and since we have taken sides on it, we must give positive confirmation of the position we have taken.

As mentioned above[20] we do not decide here exactly what acts are essential to the concept of mutual help, but taking for granted that this secondary end of marriage involves something over and above the marriage act, and that this something can be indicated in a general way as the *life-partnership*, we wish to prove that the radical right to the acts proper to this partnership is essential to marriage.

There will probably not be much objection to the statement that *cohabitation* is one of the acts necessarily implied in mutual help. If this is so, the reader can make concrete for himself what we mean by the radical right to acts of mutual help by thinking of this typical act. In

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[16] PALMIERI De Matr. thes. 1 n. III p. 4: "Eo ipso quod ius habent commiscendi, obligationem quoque habent, si utentibus coniugio Deus prolem dederit, eam suscipiendi. Idem vero finis (scil. proles) a natura praestitutus postulat ut proles suscepta rite educetur . . . . Ista igitur obligatio est essentialis matrimonio".

[17] Cf. p. 21

[18] Hence the confusion involved in the dispute referred to on p. 31 whether cohabitation is essential to marriage or only necessary for its integrity.

[19] PALMIERI De Matr. thes. 2 n. IV p. 13 and thes. 3 n. VI p. 25 seems to think it is. He seems to hold that the condition of preserving virginity would invalidate unless the right to the acts of mutual help were equally essential with the right to the marriage act. We disagree with this. It is true that the marriage right when ligated by such a condition must retain some meaning as a right—otherwise it is unintelligible. But that this meaning be its relation to acts of mutual help is not necessary. In fact its relation to acts of mutual help in that case would not explain the fundamental difficulty: How does it remain an intelligible *jus ad actum conjugalem* when the partners are obliged from justice not to exercise the act?

[20] Cf. p. 20.

this supposition, then, just as the right to *copula* is divided into proximate and radical, the former non-essential, the latter essential to marriage, so also the right to *cohabitation*, an act of mutual help, would be similarly distinguished. The proximate right to this act would be non-essential, the radical right essential. In the following considerations we wish to show merely that the radical right to acts of mutual help is essential to marriage.

a) The first argument is the one already indicated.[21] Namely, since mutual help is an essential end of marriage there must be among the rights which constitute the marriage bond the radical right to the acts by which this mutual help is realized[22]. Otherwise it is meaningless to say that mutual help is an essential element of marriage in any sense. For what is that objective and essential ordination that the marriage bond bears to its ends? Being a juridical bond, an entity of the moral order, the ordination can be nothing else but the rights and obligations of the parties with regard to the realization of those ends. This is true of contracts in general. Let us say for instance that the essential end of a certain contract of insurance is to receive indemnity in case of accident. This is the same thing as saying that the contract *essentially* consists in the *right* to receive and the *obligation* to pay the indemnity in case the accident happens.

b) Another argument is derived from the fact that the right to mutual help is essentially involved in the *primary* end of marriage which is not only the procreation but also the *education* of children. PALMIERI says, proving the malice of fornication with a concubine[23]: "For it also [such fornication] is not ordered to the proper education of the offspring, but, this being excluded, to pleasure alone. For in the intercourse of a man and woman which is ordered by nature to the procreation and education of offspring, it is necessary that the union of both be such that *per se sive ex rerum natura* the mutual provision and care for the offspring be certain and therefore that they *mutually obligate themselves to life in common:* but in unmarried intercourse there is no such certain provision; rather the provision is *per se* completely uncertain, because the mutual obligation of man and woman, which is the natural foundation of that certitude, is excluded. And even though there is an agreement to educate the offspring, it is superadded *per accidens* and not *per se:* to wit, to a union which *per se* remains essentially the same: therefore it is not a *marital* obligation but one such as might be undertaken by anyone even for the offspring of another. Looked at *per se therefore*, this union is

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[21] Cf. p. 26.

[22] We say only the radical right, because it is evident that the proximate right is sometimes absent while marriage continues to exist,—just as in the case of the proximate right to the marriage act,—for instance when the partners are legitimately separated.

[23] De Matr. thes. 6 n. III p. 40. Cf. also ST. THOMAS Suppl. q. 65 art. 3 corp.; and Contra Gentil. lib. 3 c. 122 for a similar argument.

against the law of nature even though such an agreement is superadded. It is necessary in other words that the *agreement be of the essence of the union* because the latter is essentially ordered to that end: which is the same thing as saying that the union ought to include a mutual obligation of one to the other"—namely to life in common. This argument then, goes to show not only that fornication is wrong, but that the right and obligation to *life in common*, or *mutual help* pertains to the very essence of marriage. To put the argument briefly: Marriage is essentially ordered to the education of offspring; mutual help is *per se* necessary for this education; therefore the obligation to life in common is essential to marriage.

c) From the Code, too, we can derive an argument that this radical right is essential. For after describing the object of consent as the "jus in corpus in ordine ad actus per se aptos ad prolis generationem"[24], it immediately adds[25]: "Ut matrimonialis consensus haberi possit necesse est ut contrahentes saltem non ignorent matrimonium esse *societatem permanentem* inter virum et mulierem ad filios procreandos". As we have already indicated, the idea of conjugal society coincides to a large extent with that of mutual help and it would be very strange if the Code enunciated as something necessarily to be known by the parties in order that consent be valid an element which was non-essential. It may be objected that no one doubts that the element of conjugal society, or mutual help, is essential as an *end* of marriage, but it is another thing to say that a radical right to the acts of mutual help is essential. We can only repeat in reply that to speak of mutual help as an end to which marriage is essentially related is meaningless unless this relation be explained in terms of a right (at least radical) to the acts by which the end is realized. We consider then, that the only consistent interpretation of these two canons is that which takes the object of consent as including essentially the radical right to acts of mutual help. And the fact that canon 1081 § 2 speaks only of a right "in ordine ad actus per se aptos ad prolis generationem" is easily explained in the light of our second argument above. The *jus in corpus* is essential to the primary end of marriage which includes the education of children, which in turn supposes essentially the mutual help of the spouses. Hence the *jus in corpus* of canon 1081 § 2 can be legitimately interpreted, in view of this philosophic argument, and especially in view of the reference to conjugal society in the following canon, as including also the right to acts of mutual help. This view of the "jus in corpus in ordine ad actus per se aptos ad prolis generationem" is also warranted historically. For PALMIERI is merely giving the explicit teaching of ST. THOMAS when he says (very apposite)[26]: "Si matrimonium, ut ex sensu communi supponimus, est *res permanens*, quaedam

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[24]Can. 1081 § 2.

[25]Can. 1082 § 1.

[26]PALMIERI De Matr. thes. 1 n. V p. 6; ST. THOMAS Suppl. q. 49 art. 2 ad 1 and see below p. 88.

obligatio mutua ad individuam vitam cum ipsa potestate et obligatione ad carnalem copulam reciprocatur".

It may be objected that canon 1128 does not seem to consider the right to conjugal life in common essential. For it reads: "Conjuges servare debent vitae conjugalis communionem, nisi justa causa eos excuset". The canonists, too, seem to speak of this element as necessary for the *integrity* not for the essence of marriage. For instance CAPPELLO asks the question[27]: "Is community of bed and board (habitatio) the essential object of consent?" and he replies: "There were some Doctors who taught that: but entirely without justification. According to the more common opinion which we consider the only true one, the aforesaid community pertains only to the integrity and not to the essence of the marriage contract, since as a matter of fact it is lacking at times with the permission of the ecclesiastical authority, e.g. in marriage of conscience"[28].

But these are not real difficulties against our position. As far as canon 1128 is concerned it proves no more than a similar (imaginary) canon would which would run as follows: "Conjuges reddere debent debitum conjugale nisi iusta causa eos excuset". Everyone would admit this doctrine but no one would conclude from it: therefore the right to copula is not essential to marriage. It would simply prove that the *normal* consequence, not the essential consequence, of marriage is the copula and the proximate right to copula. Similarly we maintain that actual mutual help and the proximate right to it, though normal consequences of the contract are not essential to it; only the radical right is;—and that canon 1128 speaks only of this proximate right.

With regard to CAPPELLO'S words, they should be understood in the same sense, namely as referring to the proximate right to cohabitation. This it is which pertains to the integrity and not to the essence of marriage. And this interpretation of his words is justified, first because of the reason he gives: the Church's toleration of marriages of conscience: for this proves only that the proximate right and obligation to cohabitation is absent; and secondly, because CAPPELLO holds elsewhere[29] that "mutuum adiutorium, non solum in cura rei domesticae, sed praesertim in mutua dilectione et in prolis educatione" is an *essential finis operis* of marriage[30].

Another difficulty against our position from the view point of the Code is this: Neither canon 1086 § 2 nor canon 1092, 2° which tell us

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[27]De Matr. n. 6.

[28]Cf. MERKELBACH III, n. 746; PICO n. 123; WERNZ-VIDAL V, n. 29.

[29]De Matr. n. 9.

[30]CAPPELLO also states, De Matr. n. 7: "Essentia matrimonii *in facto esse* consistit in vitae consuetudine. . . . . " But in n. 6: "Haec vitae consuetudo essentialiter consistit in iure et officio mutuo in corpus alterius in ordine ad prolis generationem."

what intentions against the essence, or conditions against the substance of marriage, invalidate consent, mention a condition "contra mutuum adiutorium" as invalidating. And of course, if the radical right to acts of mutual help is essential to marriage, then a positive intention or condition excluding such a right should invalidate. It should be noted therefore that the Code, in neither the one nor the other canon lists *taxative* all the intentions or conditions which are against the substance. For instance a condition of aborting the offspring is generally considered to be a condition against the substance[31]. Yet the Code makes no mention of such a condition. Hence from the silence of the Code on conditions "contra omne jus in mutuum adiutorium" nothing can be concluded.

There seems to be no difficulty then, in admitting that such conditions would invalidate just as surely as a condition which excludes all right to the marriage act. Nowadays, for instance, there are persons who marry with an explicit agreement to live no conjugal life in common,—to maintain separate establishments, to reserve their independence of one another. Such an agreement could easily mean to exclude *all* right to conjugal life in common, even while admitting the right to sexual intercourse, and in that case, in our opinion would invalidate the marriage. Nor should this conclusion cause surprise. For after all what could be less like real marriage than such an arrangement? Among the classical authors are some who would not hesitate to condemn such an agreement as invalidating[32].

d) Another confirmation is derived from the classical definitions of marriage in the Corpus Juris, and in the old scholastics. For instance, the *Magister Sententiarum* defines it[33]: "maritalis conjunctio viri et feminae inter legitimas personas, *individuam vitae consuetudinem retinens.*" ST. THOMAS too, gives this definition, and the scholastics generally[34]. In the Corpus Iuris Civilis we find this definition[35]:, "Nuptiae sunt coniunctio maris et feminae et *consortium* omnis vitae divini et humani juris communicatio". (This definition is quoted in "Casti Connubii"[36] to emphasize the importance of community of life in marriage). In JUSTINIAN'S Institutions marriage is defined[37]: "Nuptiae autem sive matrimonium est viri et mulieris coniunctio *individuam vitae consuetudinem continens.*"[38]

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[31] Cf. WERNZ-VIDAL V, n. 518 note 32.

[32] E.g. SANCHEZ lib. 5 disp. 10 n. 5; SCHMALZGRUEBER lib. 4 tit. 5 n. 124.

[33] Lib. IV dist. 17.

[34] In IV Sent. lib. 4 dist. 17.

[35] MODESTINUS (in Dig. lib. 23, II de ritu nuptiarum,) lib. I Reg.

[36] AAS 22 (1930) 572.

[37] Instit. I, 9 de patria potestete, paragr. 1.

[38] For further definitions consult TIMLIN p. 73; VERMEERSCH Theol. Mor. IV, n. 41; SCHMALZGR. lib. 4 De Matr. pars 1 tit. 1 n. 288.

We do not intend to discuss the history of these definitions nor the interpretations which they have received, (and to which at times they have been twisted) in the course of the centuries. Our point is simply this. The thing which the classical definitions mention *explicitly* as constituting marriage, namely, life in common (or if one prefers, mutual help) can hardly be less essential than some other element which they merely imply. It is easy to see how the right to the marriage act is included and implied as essential in these definitions. But this being true, it is very difficult to see how conjugal life in common can be anything less than essential likewise,—and that *a fortiori*. And so we consider that these definitions merely in their obvious reading incline one to the position that the radical right to mutual help, or life in common, must be essential to marriage. PALMIERI makes the same point, speaking of the secondary end of marriage. "Et re quidem vera haec amicitia seu, ut ait ST. THOMAS, individsibilis coniunctio animorum inter coniuges sibi ex obligatione servantes fidem, est illud bonum quod praecipue commendat, eius tantum explicitam mentionem faciens, definitio coniugii tradita in lure[39]".

e) Then, too, though we said above that this point was not so clearly and explicitly expressed in the scholastic, and especially the canonical tradition as the essential character of the right to the marriage act[40], yet it has not been neglected by any means in theological writings.

St. Augustine,[41] inquiring into the nature of marriage, says that marriage is a good thing, not on account of the procreation of children alone, "sed propter ipsam etiam naturalem in diverso sexu societatem". And indeed he seems to make "amicitia" the final cause and reason for the use of the marriage act itself. For he says that God has given us some of the good things on earth to be sought for *in themselves* and others to be *used* in order to acquire the first. And of this second class: "Horum enim quaedam necessaria sunt propter sapientiam, sicut doctrina; quaedam propter salutem sicut cibus et potus et somnus, quaedam propter amicitiem sicut nuptiae vel concubitus; hinc enim subsistit propagatio generis humani in quo societas amicalis magnum bonum est"[42].

ST. THOMAS, too, has a concept of mutual help which would be unintelligible unless marriage included essentially the radical right to acts of mutual help. For he makes mutual help one of the intrinsic *bona* of marriage just like *proles*. He says[43]; "Videtur quod insufficienter bona matri-

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[39]PALMIERI De Matr. thes. 2 n. II p. 10.

[40]The very expression "marriage act"—as if there were only one distinctively conjugal act in marriage—helps to obscure the doctrine that we are defending.

[41]De Bono Conjug. c. 3 (n. 3) P.L. 40—375.

[42]De Bono Conjug. c. 9 (n. 9) P.L. 40—380.

[43]Suppl. q. 49 art. 2 ad 1; compare q. 41 art. 1 corp.

monii assignentur a *Magistro Sententiarum* (Sent. IV dist. 31) scilicet, 'fides, proles, sacramentum', quia matrimonium non solum fit in hominibus ad prolem procreandam et nutriendam aed etiam ad consortium communis vitae, propter operum communicationem, ut dicitur. Ergo sicut ponitur proles bonum matrimonii ita deberet poni communicatio operum". He replies: "Ad primum ergo dicendum quod in prole non solum intelligitur procreatio prolis sed etiam educatio ipsius, ad quam aicut ad finem ordinatur tota communicatio operum quae est inter virum et uxorem, in quantum sunt matrimonio conjuncti, ... et aic in prole quasi in principali fine, alius quasi secundarius includitur".

SANCHEZ interprets "individuam vitae consuetudinem" as implying that some cohabitation is essential to marriage[44].

DE DICASTILLO says explicitly that the radical obligation of cohabitation is contained in marriage and supposes it to be essential[45].

One of the principal points of PALMIERI'S profound analyais of the essence of marriage is this: that the right to life in common is *essential* to marriage[46].

Such testimonies could be multiplied, and it is not an exaggeration to say that frequently when this doctrine is not explicitly found in an author it is nevertheless implied by his teaching on the ends of marriage, or on mutual love, etc.[47].

f) Finally, in addition to these considerations drawn from the primary and secondary ends, from the Code, the classical definitions and the theologians, it does not seem out of place to refer at least to the common persuasion of those who are getting married. After all they are the ones who are giving their consent. It is not to be supposed of course that they have divined the distinction between a proximate and radical right, either to mutual help or to anything else. They have not even thought of marriage in the language of law; and when they marry they consent (as the Ritual demands) merely to the relationship of man and wife—without, one may be sure, any analysis of what is essentially and non-essentially implied in that relationship.

But our point is this: it would be strange indeed if those getting married, who make so much of the idea of mutual help, conjugal society, cohabitation, and conjugal love, and who consider the marriage act only *one part* of this institution,—it would be strange indeed if their conviction were false. It seems to be an affront to common sense, (and philosophers ought not to lose sight of common sense) to tell the world of married people: *You* think that marriage consists in a life-partnership of which the marriage act is only one part, and perhaps not always the most impor-

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[44]Lib. 5 disp. 10 n. 5.

[45]DE DICASTILLO disp. 5 dubit. 12 n. 166.

[46]PALMIERI De Matr. Thes. 1, 2, ad 3.

[47]Cf. above note 12; and below, Chap. V notes 18 to 23.

tant; but the *truth* is that the relation of marriage to the marriage act is the *only* essential thing in it, and its relation to all those other elements of mutual help and conjugal love and cohabitation, and sharing of one another's lives, is only of secondary importance—in a word accidental; marriage *consists* essentially in the right to sexual intercourse and nothing else. And yet if the philosopher denies that at least the radical right to those other elements is essential to marriage he is equivalently asking people to accept such a statement.

The common-sense point of view could defend itself very creditably by appealing to the Ritual which the Church uses in marrying the faithful. In the nuptial Mass whether we turn to the Epistle, the Gospel, or the nuptial prayer (after the Pater Noster), we will find that the Church talks of marriage according to the common concept of it[48]. When, preparatory to asking the consent, she makes the more or less official admonitions which are contained in the various diocesan rituals[49], the picture of marriage given to the bride and groom is principally that of a life-long sharing of one another's lives, with a view of course to children. When she asks their consent, she merely asks them to accept one another as husband and wife, and they are well justified in conceiving this relationship in the way it has been proposed to them in the ceremonies and admonitions[50].

While not making a strict *argument* then, about the essence of marriage out of the popular concept of it, still we think that this universal persuasion about the importance of the element of mutual help ought at least to be taken as a sign of the *reasonableness* of our proposition. We think it *reasonable* to suppose that when the husband and wife immediately after giving their consent are asked to join hands and make the following promise (as the Catholic Ritual in English speaking countries requires), they are assuming rights and obligations that are just as essential to their new state of life as the right to sexual intercourse. The words of the Ritual read: "I, N.N. . . . take thee N.N. . . . for my lawful wife, to have and to hold, from this day forward, for better for worse, for richer for poorer, in sickness and in health, until death do us part"[51].

From all these considerations taken together we believe our conclusion

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[48]Missale Romanum, Missa pro Sponsis.

[49]E.g. The Priest's New Ritual p. 206; and see below Chap. V notes 25 to 30.

[50]How appositely, in this connection, the words of can. 1082 § 1 describe the knowledge of the nature of marriage necessary to the contracting parties. It is the same knowledge that the Rituals give them, namely that marriage is a "*societas* permanens, inter virum et mulierem ad filios procreandos".

[51]Then the bride repeats the same formula. Cf. The Priest's New Ritual p. 210. In England almost the same formula is used; cf. The Layfolk's Ritual p. 153.

is justified: the right which constitutes marriage, is a radical right to the acts by which *all three* essential ends are realized.

III.

With regard to the *properties* of marriage theologians are in accord (at least as far as the substance of the doctrine is concerned) with the statement of canon 1013 § 2, which tells us that unity and indissolubility are the essential properties of Christian marriage [52]. That they *are* essential therefore, needs no proof. It is Catholic doctrine. We will merely explain what it means to say that they are properties and that they are essential.

They are not properties in the ontological sense of the term, that is, something which necessarily flows from the essence. Rather they are called properties of the essence and not the essence itself merely because they are predicated of the essence adjectivally. One cannot have indissolubility unless one first has some *thing* which is indissoluble.

There may be a sense in which these properties can be said to "emanare ex substantia matrimonii" according to the natural law. But it is not to our purpose to demonstrate such a proposition even if we could.

We speak of unity and indissolubility as essential properties simply because in the present order of the divine economy marriage cannot exist without them. We do not stop to decide whether this essentialness is due to the natural law or the free inatitution of Almighty God.

Furthermore, these properties are essential only in the sense in which Christian tradition declare them to be so. Unity in its full sense is always essential to marriage. But indissolubility is essential to marriage with various limitations. The indissolubility of the bond has varying degrees of firmness according as the marriage is *legitimum*, or *ratum tantum*, or *ratum et consummatum*. When we predicate indissolubility as an essential of marriage, then, we mean it is essential in the sense in which Christian theology says it is essential [53].

And since these two properties do not have any bearing on our final problem, we omit discussion of all the problems connected with them and their relation to the essence of marriage.

IV.

It will be useful to make here a brief comparison between the bond, the properties, and the benefits of marriage. For these ideas as found in theological manuals often seem to crisscross and become entangled with one another, leading to confusion.

We have already seen that the three benefits of marriage,—*proles, fides, sacramentum*,—coincide with other elements;—*proles* with the

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[52] "Essentiales matrimonii proprietates sunt unitas et indissolubilitas. . . . . "

[53] "Casti Connubii" AAS 22 (1930) 552.

primary end; *fides* with unity and the remedy for concupiscence; *sacramentum* with the indissolubility of the bond.

Then too, cannot one say that the benefits *are* the ends of marriage? For after all whatever is good has the formality of being an end. "Bonum et finis convertuntur". PALMIERI says[54]: "Matrimonii finis erit bonum quoddam. . . . . " etc.; and again[55]: "Cum haec sint matrimonii *bona* (scil. the *tria bona* of ST. AUGUSTINE) erunt quoque *fines* propter quos coniugium iniri potest". And ST. THOMAS[56] says that the *tria bona* are the ends of marriage. Thus there is great confusion. For the properties coincide with the benefits and the benefits with the ends. Yet the Code[57] distinguishes the properties from the ends.

Finally some authors seem to call the bond itself and the marriage right essential *ends* of matrimony. ST. ALPHONSUS for instance, says[58]: "Fines intrinseci essentiales sunt duo: traditio mutua cum obligatione reddendi debitum, et vinculum indissolubile. Fines intrinseci accidentales pariter sunt duo, procreatio prolis et remedium concupiscentiae. . . . . "

This general intermingling of ideas is due first of all to the fact that ST. AUGUSTINE'S terminology, which was not conceived in a scholastic metaphysical mold, has been linked to the terminology of scholasticism; secondly to the fact that when speaking of the ends of marriage authors fail to distinguish at times marriage looked at *in fieri* from marriage looked at as a state. Finally there is a confusion between the *right* to the benefits and ends of marriage, and the *benefits and ends* themselves.

Thus if we look first at marriage *in fieri*—at the contract, or consent,—its intrinsic immediate end (the *finis operis*) is the marriage bond itself and all that that implies. When a workman undertakes to make a house the *finis operis* of his actions is the house itself. When people undertake to make a marriage, their consent has as its immediate *finis operis* the marriage—that is, the marriage bond which consists in a perpetual exclusive right to the acts of conjugal life. Hence in this sense everything

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[54]Thes. 2 n. II p. 9.

[55]Thes 2 n. IV p. 11.

[56]ST. THOMAS Suppl. q. 65 art. 1 in corp.

[57]Can. 1013.

[58]Theol. Mor. IV, De Matr. n. 882. Other authors who use similar terminology; MARC, Instit. Alphons. II, n. 1966; SALMANTICENSES, Curs. Theol. Mor. tr. 9 De Matr. c. 3 punct. 3 n. 23; CASTRAPALAO De Matr. disp. 2 punct. 10. For criticism of this terminology cf. CAPPELLO De Matr. n. 9; and TIMLIN p. 299. G. AREND: "De genuina ratione imped. impot." in: Ephem. Theol. Lov. 9 (1932) 56 says that the "finis operis intrinsecus" is "completum esse operis, ejus perfectio in linea essentiae". But this can be understood only of the *opus* looked at *in fieri;* otherwise the *finis operis* would *be* the *opus;* in other words a thing would be its own end.

that constitutes marriage *in facto esse* is the end of marriage *in fieri*. And in this sense we should understand ST. ALPHONSUS when he says that the intrinsic essential ends of marriage are the bond and the *mutua traditio*, etc.

If we turn now to marriage *in facto esse* we see that all those things which constitute it can be called its benefits, that is, its *bona constituentia*; but though *bona* they are not *fines* of it. When we say that "bonum et finis convertuntur" we mean that everything that is good is an end, and everything that is an end is good,—but not that a good thing is its own end. Hence the marriage bond and the rights that make it up, its exclusivity and perpetuity, are benefits that constitute marriage *in facto esse*; they are not its ends. They are ends of marriage *in fieri*. Sometimes the *tria bona* are taken in this sense, that is, as the *bona constituentia* of marriage *in facto esse*. In this case *proles* is the right to the marriage act, *fides* is the right to the marriage act (as remedy for concupiscence) and the obligation of marital chastity (exclusivity of the bond), and *sacramentum* is the indissolubility of the bond itself[58].

The *ends* of marriage are benefits in another sense. They are not *bona constituentia* but *bona acquirenda*;—they are the good things marriage is calculated to produce. And these benefits are children, the remedy for concupiscence, and mutual help. By making use of the rights which *constitute* marriage the partners realize or *acquire* the ends. The *tria bona* of ST. AUGUSTINE are also at times taken in this latter sense; thus *proles* means the children actually brought into the world; *fides* means the actual fidelity to the one partner, and the actual practice of marital chastity; and *sacramentum* means the actual common life of the partners.

Since it is not of the essence of marriage actually to attain these ends, to realize them, there is a very true sense in which they can be called accidental ends of marriage. And so we should understand St. Alphonsus in the passage quoted above[59].

Another point: although one can distinguish between the *right* to conjugal acts and the *acts* themselves, and so distinguish between the *bona constituentia* and the *bona acquirenda* or ends; can one do the same with unity and indissolubility of the bond? They are not rights, they are qualities of the bond itself and do not seem to admit of being distinguished into a right to a benefit, and the realization of the benefit. Unity and indissolubility seem to be already realized in the first moment of the contract, and can never be lost.

This is true if unity and indissolubility are taken in the strict sense

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[58] ST. THOMAS Suppl. q. 49 art. 3 in corp. makes a similar distinction.

[59] Cf. p. 64. LÉPICIER De Matr. q. 5 art. 4 n. 9 shows philosophically how the *end* of a thing does not pertain to the essence of the thing (i.e., as a constituent part). And compare ST THOMAS Suppl. q. 42 art. 4.

in which the Code takes them[81] as properties diatinguished from the ends of matrimony. But there is a sense in which they too may be said to look to a fuller realization. Inasmuch as the exclusivity of the bond imposes the obligation of fidelity to the partner, thia future actual fidelity is a *bonum acquirendum* or an end[82]. Does that make a fourth essential end of matrimony? No, for thia fidelity inasmuch as it excludes sexual indulgence outside of marriage is the negative part of remedy for concupiscence. This actual restraining of concupiscence is an end of marriage,—a *bonum acquirendum*. Similarly indissolubility when realized in practice amounts to something more than a mere quality of a juridical bond. When it is actuated it becomes life in common. It is merely another way of looking at mutual help.

And so unity and indissolubility, (*fides* and *sacramentum*) can be looked at in a narrow or a wider sense. In the narrow sense they are merely properties of the marriage bond. In the wider sense they include acts by which the secondary ends of marriage are realized. There is no doubt that when St. Augustine apoke of *fides* and *sacramentum* he meant them also in this wider sense,—as benefits which marriage actually produces[83]. The "Casti Connubii" likewise uses the terms in a broad sense[84].

The tangle of ideas, then, which results from speaking about the bond, properties, ends, and benefits of marriage in so many different senses, can be unravelled by keeping in mind: 1) the distinction between the ends of marriage *in fieri* and the ends of marriage *in facto esse;* 2) the distinction between the *bona constituentia* and the *bona acquirenda* of marriage *in facto esse;* 3) the distinction between the *right* to the acts by which the ends are realized, and the *realization* itself.

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[81]Can. 1013 § 2.

[82]St. Thomas Suppl. p. 49 art. 3 in corp. thus distinguishes the obligation of *fides* from the realization of it. But he does not make a aimilar distinction for *sacramentum* i.e. indissolubility.

[83]De Bono Conjug. c. 3 (n. 3) P.L. 40—375; c. 24 (n. 32) P.L. 40—394; De Nupt. et Concup. I, c. 10 (n. 11) P.L. 44—420; I, c. 11 (n. 12) P.L. 40—420; "Omne itaque nuptiarum bonum *impletum est* in illis parentibus" scil. Mary and Joseph; I, c. 17 (n. 19) P.L. 40—424. Compare also "Casti Connubii" AAS 22 (1930) 539. Mausbach I, p. 322 shows that in *fides* St. Augustine includes union of spirit and conjugal love.

[84]"Casti Connubii" AAS 22 (1930) 546 sq.

CHAPTER III.

THE MARRIAGE RIGHT AS A RELATION

In this chapter we will attempt to explain what it means to say, (as the authors commonly do), that the essence of marriage is a *right*, and at the same time that the essence of marriage is a relation. Consequently we will examine first as accurately as possible the fundamental nature of a right, and then having established its *relative* character, apply these ideas to the marriage *relation*. This analysis of the nature of a right will serve too, as the foundation for the following chapter in which we will discuss the meaning of the *radical* right; it is likewise necessary for the solution of the problem proposed in the present essay.

The definition of a right frequently found in philosophy manuals runs as follows: Jus subjectivum seu formale est facultas moralis inviolabilis faciendi, exigendi, possidendi aliquid[1].

To this definition the following objections have been made. In calling a right a moral faculty one gives the impression that it is a sort of proximate principle of licit operation. The word moral is easily misunderatood as meaning the opposite of immoral, whereas it really means "intentional" or "juridical". Thus one can have a right to an immoral act in the sense that one has the power of placing it validly[2]. And the word faculty, implying an analogy between faculties of the physical order which *are* proximate principles of operation, may easily be pushed too far and lead to logical embarrassments.

For instance, we frequently distinguish between a right and the exercise of a right. Yet VERMEERSCH says that one cannot distinguish between a moral faculty and the exercise of a moral faculty, as if the former could exist when the latter is impossible. The distinction is valid, says this author, when applied to physical faculties and their acts, "sed quando facultas est tota moralis, facultas sine exercitio est facultas quae non *habetur* sed quae *haberetur* si persona capax foret"[3]. Hence the rights of infants, and moral persons, who are incapable of exercising a moral faculty should not be conceived as faculties. Their rights imply faculties,

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[1]Compare the definition of CARRIÈRE tom. 1 N. 8 (p. 12): "Potestas legitima aliquid agendi vel obtinendi in proprium commodum"—which seems to be based on LESSIUS De Just. et Jur. c. 2 dub. 1 and 2; cf. below note 6.

[2]WIRCEBURGENSES III, De Jur. et Just. n. 49 sq. especially n. 50; KRIMER IV n. 820.

[3]VERMEERSCH Theol. Mor. II, n. 341 note 2; compare HENRIQUEZ lib. 11 c. 4 n. 1 and lib. 12 c. 2 ad fin.

but these exist not in the infants, or moral persons but in their guardians or trustees, or agents. To say that the right itself is a faculty would make the right exist twice, once in the infant and again in his guardian.

We are not particularly concerned with the validity of these latter objections. It seems possible to us, understanding the word faculty as "potestas" in a broad sense, and the word moral as "intentional" or "juridical", to defend the ordinary definition against these exceptions. But it cannot be denied that the concept of a right is not *clearly* enough indicated in the familiar definition, and that consequent misunderstandings of its fundamental character, of what it is in the ontological order, lead to false arguments and to errors. This is true in the case of the *jus in corpus* especially.

Accordingly it will be useful to restate the classical definition of a right, and compare it with the familiar one in the manuals.

The nature of a right, says MASTRIUS, is more easily understood from common sense than from philosophical analysis[4]. And yet it will not do to neglect its scientific analysis[5]. For this neglect led in the past to a definition of right in the ordinary treatises on justice which involved a vicious circle. Authors defined a right as "facultas utendi re pro libito citra *injuriam* alterius"[6]. Then later they defined an injury as that which was "contra jus".

It was the acute mind of DE LUGO which attempted the difficult analysis and gave us a definition and philosopsy of right which have been substantially accepted as the basis of the common teaching ever since. Even authors who disagreed in part with DE LUGO'S analysis paid tribute of praise to his penetration[7], and admitted the correctness of his principal contentions.

It is to be noted with regard to the "definitions" of a right, that the idea is so fundamental and simple that it is not possible to give a strict definition of it,—any more than one can strictly define what the word "mine" means. Hence the definitions are analytical explanations[8].

DE LUGO'S definition runs thus: a right is "praelationem quandam moralem, qua hic homo praefertur moraliter aliis in usu talis rei propter

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[4]MASTRIUS In IV Sent. lib. 3 disp. 7 q. 8 art. 1 n. 164; ANTHONY PEREZ tr. 1 disp. 1 c. 2 paragr. 4 n. 40.

[5]ANTHONY PEREZ tr. 1 disp. 1 c. 2 paragr. 4 n. 42 and 43.

[6]This objection is made by MASTRIUS In IV Sent. lib. 3 disp. 7 q. 8 art. 1 n. 164; ANTHONY PEREZ tr. 1 disp. 1 c. 2 Paragr. 4 n. 40; and especially by DE LUGO, De Just. et Jur. disp. 1 sect. 1 n. 3. As an example of such a definition cf. LESSIUS De Just. et Jur. c. 2 dub. 1 n. 2: "Jus est potestas legitima ad rem aliquam obtinendam, vel ad aliquam functionem, vel quasi functionem *cujus violotio iniuriam constituit*".

[7]MASTRIUS In IV Sent. lib. 3 Disp. 7 q. 8 art. 1 n. 164; ANTHONY PEREZ tr. 1 disp. 1 c. 2 paragr. 6 n. 59; also c. 5 n. 90 and c. 7 n. 110.

[8]MERKELBACH II, n. 150.

peculiarem connexionem, quam res habet cum eo. . . . . "[9]. DE LUGO explains at length the nature of thia *preference* and the nature of the special *connection*. And although he apeaks of a right nominally as a "potestas legitima" and as including varioua "potestatea", he does not compare it to a *faculty* and does not think of it as a faculty. It is evident from the whole context that DE LUGO looks at a right not as a moral faculty but as a moral *relationship* of independence with regard to the use of the object of the right, whatever it may be. And this seems to be the point of his choice and repeated use of the word "praelatio" to indicate the fundamental character of a right.

The words "special connection" in the definition are merely another way of expressing this relationship of moral preference which constitutes a man's right to a thing. The special connection is established by some act or fact—DE LUGO gives the instance of *occupation* of a wild animal. The fact of its capture gives it from that moment a apecial connection with the capturer in virtue of which it is *referred to his utility* to the exclusion of others. With regard to auch an animal he enjoys a position of preference,—a "praelatio". The fact that founds this connection (the title to the right) may do so in virtue of the natural or the positive law,—but it is always in virtue of some *law*. The physical fact of occupation by itself does not found a right. Might does not make right.

This is merely a philosophical way of explaining what the worda *mine* and *thine* really mean. DE LUGO[10] saya that he ia making his analyaia "In order that we may understand therefore, thoroughly once and for all tha nature of that right which justice has to do with and which we indicate when we say *mine* and *thine*". And again he saya: "Not every preferance with regard to a thing is that right which commutative justice has to do with, but a preference by means of which this man is *preferred to others in the use of such a thing;* for on account of the peculiar connection which the thing has with him, the whole of it should be referred and ordered to his utility; and this ordination la principally indicated when anything is called mine or thine."

ANTHONY PEREZ says that the whole point of the difficulty in analyzing the notions of right and justice is in getting to the bottom of the idea of "suum". He says[11]: "We are inquiring therefore what it is for a thing to be *one's own*. What kind of evil is it to take away from another what is *his own*. And what sort of obligation ia there not to take away but rather to restore what is *his own*."

The philosophers of law of today recognize the same fact, that the problem of commutative right is fundamentally a problem of the meaning of the words mine and thine[12]. Just where the problem will lead (for there

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[9]DE LUGO De Just. et Jur. disp. 1 sect. 1 n. 5.

[10]Disp. 1 sect. 1 n. 5 and 6.

[11]Tr. 1 disp. 1 c. 2 paragr. 5 n. 51.

is still a problem) is not pertinent to the present essay. But it can safely be said that DE LUGO'S analysis, establishing the notion of right as a *relationship*, is a settled point accepted by all,—even by those of his critics who did not accept his explanation in full. Thus MASTRIUS[13] while trying to improve on DE LUGO'S analysis admits that he does not wish to attack it, and that the idea of the connection is fundamental. ANTHONY PEREZ who, in a long and subtle disputation comes to the conclusion that personal liberty is at the bottom of the notion of right, and is the formally distinctive element in its definition[14], nevertheless admits that DE LUGO'S analysis of the "peculiaris connexio" is fundamental too[15]. BELLUTUS approves of DE LUGO'S analysis[16]. LESSIUS[17] describes the "potestas legitima" which he puts in his definition as a "habitudo". REBELLUS, too[18], recognizes along with the others the fundamental note in a right: it is a relation.

Of the modern authors VERMEERSCH and MERKELBACH come closest to giving DE LUGO'S own definition of a formal right.

VERMEERSCH defines it[19]: "Jus formale seu subjectivum est inviolabilis *autonomia* personae seu entis sibi existentis, in persequendo fine proprio propter quem existit, et inviolabilis *relatio praevalentiae* seu quasi-dominii in res quae ad finem seu bonum istius personae destinatae sunt". Notice that VERMEERSCH'S definition combines the elements of "autonomia" emphasized by PEREZ, and "relatio praevalentiae" characteristic of DE LUGO'S analysis. In our opinion the first half of VERMEERSCH'S definition could be omitted. For inasmuch as "autonomia" refers to independence from others in the use of a given right, it is sufficiently expressed in the word "praevalentia"; and inasmuch as it refers to the liberty by which a human person is said to be fully autonomous or "sensu pleno sibi

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[13]ZARAGÜETA Y BENGOECHEA, "El Concepto de lo "suyo" en la definición de la justicia," in: Miscellanea Vermeersch II, p. 208. It is interesting to note the direction of ZARAGÜETA'S thought. He shows that the connection of *suitas* is much more real and tangible in the case of something which a man makes or produces than when the special connection it has with himself is founded on some merely extrinsic factor. How much more truly and essentially a man can say: It is mine because I *made* it, than: It is mine because I *found* it.

[14]In IV. Sent. lib. 3 disp. 7 q. 8 art. 1. n. 164.

[15]Tr. 1 disp. 1 c. 3 n. 73.

[16]ANTHONY PEREZ tr. 1 disp. 1 c. 2 paragr. 6 n. 59; c. 7 n. 110. Furthermore in c. 2 paragr. 7 he says that according to ST. THOMAS and ARISTOTLE the *suitas* of a thing consists "in ordinatione rei ad personam tanquam partis ad totum aut accidentis ad subjectum aut rei tanquam ad finem suum".

[17]BELLUTUS disp. 7 q. 5 art. 1 n. 122.

[18]De Just. et Jur. lib. 2 c. 2 dub. 1. n. 1 and 2; lib. 2 c. 3 art. 6 n. 26.

[19]REBELLUS pars 2 lib. 2 q. 1 n. 3.

[20]Theol. Mor. II, 841.

existere", it is rather a prerequisite for the possession of rights than a constitutive element of the right itself[20].

Finally MERKELBACH, although giving the usual definition of a right[21]: "facultas moralis et inviolabilis aliquid habendi, faciendi aut exigendi tamquam exclusive suum in proprium commodum", yet explains it exactly as De Lugo does[22]: "Jus itaque essentialiter est *praeferentia moralis*, qua quis praefertur, ceteris omnibus exclusis, *in usu alicujus rei* propter peculiarem connexionem quam res habet cum eo. Est vinculum morale i.e. connexio rectae rationi conformis, qua fit ut res de qua agitur iam aestimari debeat exclusive destinata utilitati et commodo illius qui hanc connexionem obtinuit. Fundamentum igitur essentiale seu *constitutivum* iuris est illa connexio; quae si existat, ius existit, si vero non existit aut si tollatur, nec ius existit."

The explanation of a right given by DE LUGO then, is classical, and in its essential point, the idea of the "praelatio moralis", or the relation of preference, is accepted by all. Hence for the rights of human society, the rights between man and man[23] we can propose confidently the following definition (or rather explanation) of a right.

A right is a moral relation of preference by which a person prevails exclusively over a thing which is legitimately destined to his good or *utility*. We will explain the words of the definition.

Moral. Here the word is not used as the opposite of immoral, but means "intentional" or "juridical". Authors explain the nature of the intentional order of being when dealing with the intentional causality of the sacraments. For instance LERCHER[24]: "Esse intentionale dicitur illud, cui convenit esse, quatenus objective terminat intentionem mentis, i.e. vel intellectionem, vel volitionem, vel quamcunque ordinationem intellectus practici. Ita rationes objectivae mente expressae; rationes boni prout in eas tendit voluntas; deinde, obligationes, jurisdictiones, tituli, dignitates, deputationes ad certa munera et alia elusmodi, quae ordinantur ab intel-

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[20]Cf. for example MERKELBACH Theol. Mor. II, n. 152. And it may even be questioned whether a subject of a right must necessarily be a being endowed with liberty. Think, for example of a moral person, or a pious foundation. These juridical persons must be *sibi existentes* and in that sense autonomous, which autonomy they receive from the law, natural or positive. But it is difficult to point out in them a subject of rights *endowed with liberty* and hence autonomous in the full sense of the term.

[21]MERKELBACH Theol. Mor. II, n. 150.

[22]MERKELBACH Theol. Mor. II, n. 151.

[23]We say between man and man because in the supposition that man has rights with God we do not wish to declare that this explanation would be univocally applicable. Cf. ANTHONY PEREZ tr. 1 disp. 1 c. 7 n. 110.

[24]LERCHER IV, 203.

lectu practico absque ulla mutatione physica rerum, circa quas fit ordinatio, sunt entia intentionalia et pertinent ad ordinem intentionalem.

"Entia intentionalia, quae fiunt per intellectum practicum ordinantem saepe entia *moralia* (juridica) vocantur. Ens morale non dividitur contra ens reale, sed contra ens naturae vel physicum. Entia moralia inducuntur in rebus per veras et reales ordinationes intellectus practici et magnos effectus habent in vita humana; ideoque sunt entia suo modo realia, et valde differunt ab entibus rationis stricte dictis, quae habent esse objective tantum in intellectu speculativo"[25].

BILLOT explains the nature of these intentional entities saying[26]: "Tota eorum entitas consistit in ipsa intentione intellectus imperantis prout est subjecto veluti affixa et in eo perseverat non revocata". Thus the oral or written words of a contract are an intentional *instrument* by means of which rights etc. are transferred or created. And in general contracts and rights belong to the order of intentional being[27].

When we define a right therefore as a *moral* relation we merely mean that it is an entity of this intentional or juridical order, and would have used these words rather than the word "moral" in defining it except that nowadays "moral" is the term in common use.

Relation. The relation therefore, in which a right consists is a real relation of the moral order. Its foundation is the title to the right whatever that may happen to be—some fact which by a decree either of the natural or the positive law establishes the "peculiaris connexio". For instance, the expressed consent of the parties is the foundation of the rights they acquire in a contract. The subject of the relation is the person who is said to have the right. The term of the relation is primarily the thing to which he has a right. The subject of the right is generally a real entity of the physical order, namely a physical person, but may also be a moral person. The term of the right is generally a real entity of the physical order i.e. a thing or an action—but it may also be an *omission*, or may be a physical thing that does not yet exist determined *in individuo*, but will exist later on. But the *foundation* of the relation which is a right is always in the moral order, and hence the relation itself belongs to the moral order. Nor can one object that the foundation (title) of a right is also a physical fact e.g. occupation of an animal, or the expressed words of consent to a contract. For these found the relation and the right not as

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[25]DE LUGO De Sacr. disp. 1 sect. 3 n. 42 on the sense in which such moral entities are said to be *real*.

[26]Cf. BILLOT. De Sac. I, q. 67 (p. 65).

[27]BILLOT De Sacr. I, q. 67 (p. 137). Compare also DE LUGO De Sacr. disp. 1 sect. 3 n. 35 sq.; MASTRIUS In IV Sent. lib. 4 disp. 7 q. 1 art. 1 n. 4 and 5 where he refers to his Disp. III Log. q. 2 and to Scotus In IV Sent. lib. 1 dist. 30 q. 2; REBELLUS pars 2 lib. 2 q. 1 n. 3; LESSIUS De Just. et Jur. lib. 2 c. 2 dub. 1 n. 3.

physical but as instruments of the law (natural or positive); in other words they are "*instrumenta intentionalia*"[28].

Preference. For lack of a better word we translate "praelatio" as preference. It is strange perhaps that we have no word, completely general, to indicate in the abstract the relation which in the concrete is indicated by the word "mine". The word "ownership" will not do because it is not general enough and in English usually indicates *proprietorship*. In Latin the word "suitas" is sometimes used to express this relationship, —but then it is generally referred to the object of the right. The "suitas" of a thing is the relation *it* has to its owner as such[29]. But we explain what we mean by "relation of preference" in the following words of the definition.

Prevails exclusively. These words imply *first*, that the thing to which a man has a right is subjected to him; so that to the relation of preference or dominance of which he is the subject and the thing is the term, there corresponds a relation of subjection or "suitas" of which the thing is the subject and he the term[30]; and *secondly*, that in all other men there is an obligation to respect his predominance, so that his right implies always an obligation on the part of others[31].

Thing. The word is taken in the largest possible sense. The authors discuss sufficiently which things can be objects of rights, and which can not. A human person for instance, (in the philosophical sense of the word), can never be made a mere means in regard to another person.

Legitimately destined.—that is, by law, either natural or positive. In other words the man must have a title either by natural or positive law to the thing to which he has a right. This is another way of saying that the thing must have a *peculiaris connexio* with himself[32].

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[28]BILLOT De Sacr. I, q. 67 (p. 65); REBELLUS pars 2 lib. 2 q. 1 n. 3; LERCHER IV, n. 204.

[29]ANTHONY PEREZ tr. 1 disp. 1 c. 2 paragr. 7 (citing ARISTOTLE and ST. THOMAS).

[30]LESSIUS De Just. et Jur. lib. 2 c. 3 art. 6 n. 26.

[31]The word "inviolable" is often used in defining right to express its exclusivity and the consequent obligation of others to respect it. Whether this note of exclusivity should be considered as an essential property or as a part of the very essense of a right is not a question that need detain us. VERMEERSCH and PEREZ, by putting "autonomia" and "libertas" in the definition *in recto* seem to consider it as part of the essence. As we hinted above we prefer to consider the independence of the person in general as a prerequisite for a right, and his independence in the use of a particular thing to which he has a right as a consequence of the subjection of the thing to *his utility*.

[32]DE LUGO De Just. et Jur. disp. 1 sect. 1 n. 5 sq. MASTRIUS In IV Sent. lib. 3 q. 8 art. 1 n. 164 thinks DE LUGO's definition should be amended to include the origin or title of the right,—i.e. whether from natural or positive law etc. But DE LUGO indicates the title sufficiently for a *general* definition by speaking of the "connexio peculiaris". Compare MENDIZABAL I, Chap. 15 n. 176 note 1; n. 177; n. 178 notes 1. 2. 3.

To his good or utility. These words are added for two reasons: first, to emphasize the fact that man has rights to things fundamentally because as a person he needs them in the prosecution of his end. Thus they are useful to him, or *means* (bonum utile) by which he is helped to reach his end; and secondly, to exclude the possibility of conceiving a superior's relationship to the persons and actions he is empowered to command, as a relationship of justice. The superior has a relation of preference over certain actions of his subordinates, but not in the sense that he can refer them to his own utility as mere means to his private ends. Obedience is not to be confused with justice[23].

But we have said that the object of a right should be something which is referred to the *good* or utility of the subject of the right, lest anyone should infer that a thing must be *useful* to the owner in a strict sense of the word in order that he may be said to have a right to it. It is not necessary to point out a definite *utilitarian* value in the object of a right. It is enough if it is a good thing which the right-holder can reasonably call his *own* without offending common sense or philosophy. Most objects of rights are of course a *bonum utile* in the strict sense, but even amongst men we have examples of rights in which no definite utilitarian value can be assigned. The commutative right of the dead to their reputation is an example of a right which is of no utility to the dead man—but reputation is a good even to him and he can say of it reasonably: It is mine, and he who deprives me of it, does me an injustice.

This is the opinion of SUAREZ. For arguing against those who hold that man cannot do God an injury in the strict sense of the word, he speaks as follows: "Auctores vero oppositae sententiae. . . . . negant posse creaturam veram injuriam contra Deum facere. Et rationem reddunt quia nullum bonum possunt a Deo auferre, quod ei sit *commodum vel utile;* et ita nullum damnum ei inferre possunt, et consequenter neque propriam injuriam. Sed tam assertio quam ratio nobis valde displicet." And his reason: "Injuria secundum adaequatam rationem suam, non consistit in diminutione seu laesione *boni utilis* cujus quilibet ratione utens sit dominus *sive inde capiat utilitatem sive non.* Quod patet tum quia ubi est dominium, est proprium ac rigorosum jus; ubi autem est proprium jus, si illud laedatur, est injuria, quia injuria nihil aliud est quam privatio juris debiti, tum etiam quia talis laesio fit alteri, ipso rationabiliter invito; nam quilibet dominus eo solo quod dominus est, rationabiliter vult ut alius qui jus non habet non privet ipsum re cujus est dominus, *sive ab illa capiat utilitatem sive voluptatem, sive solum extrinsecum honorem et aestimationem;* omnia haec bona sicut rationabiliter possidentur, ita rationabiliter defenduntur." And although he is speaking here of commutative justice as between man and God, he holds that even between man and man the note of strict *usefulness* of the

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[23] DE LUGO De Just. et Jur. disp. 1 sect. 1, n. 6 sq.

right is not essential: "Ex quibus omnibus colligitur primo quo sensu sit intelligendum et qua ratione sit verum, materiam justitiae commutativae esse aequalitatem dati et accepti. Nam si hoc intelligatur de datione et acceptione *cum mutua utilitate*, et dominiorum translatione, invenietur id quidem in humana justitia, *at fortasse non semper*, sed frequenter, ut postea declarabo; per se tamen et formaliter id non spectat ad rationem justitiae commutativae."[34]

And accordingly, in what follows, when we speak of "utility", or "good and utility" as characteristics of the object of a right, we do not use the word utility in a narrow sense, which would exclude for example a *bonum delectabile*. We use utility in a broad sense, and by the "utilities" of an object wish to understand whatever there is of good in it, which a man can sensibly call his own.

We have made this tedious examination of the nature of a right because the word right occurs in the philosophy of marriage so continually and in such recondite ways that it is essential to have a clear idea of its ultimate meaning. Hence this analysis serves not only to explain the doctrine of the marriage-relation, but also prepares the way for the discussion of the *radical* right, and connected questions, which we treat in the following chapter; and especially is it essential to the solution of our final problem about combining marriage and virginity.

After establishing then, the fundamental nature of a right as something relative,—as a relation,—it is easily understood how the essence of marriage is said to be both a right and a relation. The fundamental marriage-right and the fundamental marriage-relation are one and the same thing. To us it seems that the understanding of this proposition is at least greatly obscured as long as one thinks of a right as a faculty; and this is one of the reasons why we insist on the classical definition.

Taking for granted with the common teaching that marriage is a relation[35], it only remains to discuss briefly the question formerly controverted about the nature of this relation. The dispute is not an important one and seems to be more about words than anything else[36].

One group claimed it was a real relation[37]. But they did not mean by

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[34]SUAREZ (Tom. II) Opusc. VI, Disp. de Just. Dei, Sect. II n. 10, 11, 19.

[35]Cf. for example ST. THOMAS Suppl. q. 44, 1 ad 2 and 3; art. 2 in corp; q. 47 art. 4; ST. BONAVENTURE in IV Sent. lib. 4 dist. 27 art. 1 q. 1 (where he proves *a priori* that marriage must be a relation); BILLUART tom. 10 De Matr. dissert. 1 art. 1; BILLOT De Sacr. II, p. 329 note 2 and p. 335; PALMIERI De Matr. thes. 1 n. III circa fin.; EICHMANN p. 330. See also the authors quoted below, notes 35 to 49; and above Chap. II, note 2.

[36]Cf. e.g. AVERSA De Matr. q. 2 sect. 1. And ANTONINUS, Summa III, tit. 1 c. 20 ad fin.: "subtilis materia est".

[37]BRANCATUS disp. 12 art. 6; SANCHEZ lib. 2 disp. 1 n. 6 and 7; SALMANTICENSES, Curs. Theol. Mor. tr. 9 De Matr. c. 3 punct. 1 n. 4.

this that it was a real and physical relation[38]. They simply claimed that it was real in the sense that people were really married whether anybody thought about it or not. In other words marriage is not an *ens rationis* of the speculative intellect[39].

Another group claimed that it was a rational relation[40]. For, they said, the marriage relation puts nothing *physical* in the parties, there is no physical foundation for the relation, and it exists only in virtue of the operations of the mind[41]. But they meant of course the *practical* intellect, and the will. And LERCHER[42] calls attention to the great difference between such entities and an *ens rationis stricte dictum* which has its being only objectively in the speculative intellect.

Finally another group not wanting to admit that it was a real relation because it was not physical, and not wanting to admit that it was rational, for marriage in a given case was certainly an existing reality independent of our thought about it, said it was neither real nor rational but a real extrinsic denomination[43].

To us it seems that these opinions are not conflicting but that they all are different ways of expressing the proposition: *marriage is a real relation of the moral order*. We have already indicated sufficiently what we mean by the real moral order[44]. And thus we satisfy the objections

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[38]The SALMANTICENSES however seem to think the relation is real and physical, (Curs. Theol. Mor. tr. 9 De Matr. c. 3 punct. 1 n. 4). For they compare it to the relation of paternity and filiation: "Nam sicut transacta generatione remanet relatio realis filiationis et paternitatis supra illam fundata et ab ea producta, ita transacto contractu mutuo quo se coniugea ad invicem tradiderunt remanet relatio dominii juris et potestatis, subjectionis et obligationis mutuo inter illos repertae". But there is no argument here, for as noted above, the physical fact (consent) which founds a contractual right, founds it not as physical, but inasmuch as it is an *intentional* instrument, that is, a being of the *moral* order.

[39]LERCHER IV, n. 203.

[40]SCOTUS In IV Sent. lib. 4 dist. 26 q. unic. n. 16 says that the marriage bond "est relatio tantum realis extrinsecus adveniens, vel quod verius videtur, *relatio rationis* quia nihil est ibi nisi. . . . . " etc. Cf. HIQUAEUS in h. l. SCOTI n. 82; REBELLUS pars 2 lib. 2 q. 1 n. 3.

[41]And REBELLUS pars 2 lib. 2 q. 1 n. 3 applies the same doctrine to all contracts. They are all "relationes rationis".

[42]See above p. 45.

[43]Thus MASTRIUS In IV Sent. lib. 4 disp. 7 q. 1 art. 1 n. 4 and 5; MARTIN PEREZ De Matr. disp. 13 sect. 2 n. 4; AVERSA De Matr. q. 2 sect. 1.

[44]Cf. DE LUGO De Sacr. disp. 1 sect. 3 n. 35 sq. and especially n. 42. De Lugo is discussing the dispute between SUAREZ and VASQUEZ whether a sacrament *pro formali* is a real or a rational entity. He decides it is a real entity of the moral order, constituted by a real extrinsic denomination.

both of those who say it is not real because not physical and of those who say it is not rational because it is really there whether we think about it or not. With regard to the third opinion that it is a real extrinsic denomination, we have no quarrel, but simply add to it by saying that since husband and wife are essentially relative denominations, so too, marriage is a real *relative* extrinsic denomination. As St. Thomas says, (after calling marriage a "relatio aequiperantiae")[45]: "Quia non potest esse quod aliquis sit vir non uxoris vel quod aliqua sit uxor non habens virum, sic nec mater non habens filium. . . . . " etc.

An example of an extrinsic denomination of the specuiative order is *Petrus cogitatus*. The fact that he is being thought of does not add any physical entity to him at all, yet as long as he continues to be thought of we can say that he is really thought of. An extrinsic denomination of the practical order may be illustrated by jurisdiction. When a judge acquires jurisdiction he is not changed physically at all,—but as long as the will act of his superior granting him the jurisdiction remains unrevoked, he is *really* extrinsically denominated as having jurisdiction. As we have already noted, with LERCHER, such a being of the intentional order has much more reality (and importance for human life) than a merely speculative denomination. DE LUGO[46] gives a sacrament as another example of the same thing. In the case of marriage, since it is a set of rights and obligations established by the irrevocable consent of the parties, it, too, can be called an extrinsic denomination of the intentional or juridical or practical or moral order. And this is what MASTRIUS and PEREZ[47] call it. But since the consent to which it owes its origin terminates in rights and obligations which are essentially relative entities, and since husband and wife are essentially relative denominations, there is no reason why it should not be called a relative extrinsic denomination of the moral order. And that is all that is signified in the last analysis by saying *it is a real relation of the moral order*.

Accordingly we feel justified in saying that it is common doctrine that marriage is a real relation of the moral order and that the dispute is really one of terminology. It is clear too, what was meant by saying in the beginning of this inquiry into the essence of marriage that marriage is an entity of the moral or intentional order, and that though we speak of its substance etc. as a juridical institution, ontologically it has no substance at all but is in the category of accident[48]. For the group of rights and corresponding obligations that make it up are *relations*, and therefore, ontologically speaking, accidents. And this, perhaps, needed no demonstration.

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[45]ST. THOMAS Suppl. q. 47 art. 4 in corp.

[46]DE LUGO De Sacr. disp. 1 sect. 3 n. 35 sq.

[47]See note 42 above.

[48]See above p. 10.

And although we have spoken of marriage as a relation, as though it were one relation, it is quite evident from what has gone before, that it is really a group of relations. For it consists in the husband's relation of preference over his wife's person, her corresponding relation of subjection or obligation, *her* relation of preference over his person and his corresponding relation of subjection or obligation[49]. Hence the radical right which is the marriage bond is not one but a group of relations[50]. Nevertheless it will be more convenient generally to speak merely of the right or the relation in the singular, understanding that it is a group of rights and relations, and that for every right there is a corresponding obligation.

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[49]BRANCATUS disp. 12 art. 6 n. 68: "Quid autem impedit quin quattuor relationes reales componant hoc vinculum?"

[50]ST THOMAS Suppl. q. 44 art. 1, ad 3 conceives the unity and multiplicity of the relation in a slightly different way, in the following words: "Relatio quae est matrimonium ex una parte habet unitatem in utroque extremorum, scil. ex parte causae quia ad eandem numero generationem ordinatur. Sed ex parte subjecti habet diversitatem secundum numerum, et ideo haec relatio est una ex parte causae et multiplex ex parte subjecti. Et secundum quod est multiplex ex parte subjecti significatur his nominibus, uxor et maritus, secundum autem quod est una significatur hoc nomine, matrimonium."

CHAPTER IV

THE RADICAL RIGHT IN MARRIAGE

The object of the present chapter is to determine accurately the meaning underlying the phrase "radical right" in marriage, and to describe this right as far as possible in the terminology of commutative justice. As we saw in the case of the ontological terminology (essence, substance, properties, etc.), it can only be applied to a moral institution like marriage with restrictions. And here again when we look at the radical marriage right and try to establish its meaning and to put it in the categories that are found in the treatise "De Jure et Justitia", we cannot expect complete success. For those catalogues were made with strict property rights in view for the most part. And the marriage contract, and the rights consequent upon it, though strictly matters of commutative justice, are nevertheless *sui generis* in this field. And perhaps it is not possible (or even worth the trouble) to find the exact pigeon-holes in the treatise "De Justitia" into which the marriage right can be made to fit. But since the theology of marriage speaks of the right as a *dominium*, of a *jus in re* and a *jus ad rem*, and other such terms, we are under a sort of theological obligation of indicating our opinion in these matters. It will not be entirely useless either to determine whether, when we speak of a "jus in corpus in ordine ad actus", the object of the right (or term of the relation) is the "corpus", or the "actus", or both. At all events it is essential to our thesis to have as accurate a notion as possible of the distinction between a proximate and radical right. With this in view, we continue our analysis of commutative rights.

After establishing his definition of a right, DE LUGO draws several inferences, one of which will be of interest to us[1]. "I infer secondly, that in the same way, according to the will of the owner having that complete preference based on a connection of that kind, that preference can be divided so that one may participate in one part of it and another another part. For thus it is that one can have the use without the dominion, another the dominion without the complete use, etc., because, in fact, the owner according to his own will, wished to transfer to another his 'connection' not inasmuch as it was the basis of that complete preference but only with a view to such and such effects;—and since all these effects are brought about morally, it is not difficult to understand that they are also brought about partially, according to the will of the owner who thus makes a division. And so all those rights of usufruct, of simple use of direct dominion, and others of the sort, which we will treat individually later on, are nothing else than greater or lesser parts of that preference which gives a complete right with a view to all those effects, but which after-

[1]DE LUGO De Just. et Jur. disp. 1, sect. 1 n. 18.

wards undergoes a restricted tranafer ['postea derivatur cum limitations'] with a view to this or that effect and not with a view to all of them".

From the fact, then, that we are dealing with a moral entity, and that that moral entity is a relationship, follows the possibility of distinguishing between a right and the varioua faculties which it connaturally includes. For instance a man who has the ownership of a house, has also, naturally, the faculty of living in it. But he can separate this faculty from the rest of the right, and keeping the right, hand over that particular faculty to somebody else. When a right is defined as a faculty of doing something, this distinction though not impossible to make, if the word faculty is properly understood, is nevertheless harder to understand. For putting the word faculty into the definition, pushes into the background the idea of a relation of ownership, a relation of "suitas" between owner and object, which, as we shall see can exist even when the faculty of doing something (the active or operative faculty) with regard to the object is no longer present.

There is no difficulty at first sight In understanding this separability of right to an object, and faculty of using it, in the illustration given above of a man who gives to another the right of habitation In his house. For In that case the owner has direct dominion over the house; the substance of It is his, and he keeps his dominion over the substance, giving the use to someone else. He can alwaya say of the house itself: It is mine, I own it. And this would remain true even if he were receiving no rent from his tenant and had given up the right to collect rent. He would always retain with regard to the aubstance of the house that relation of exclusive preference, which would enable him to say: It is mine; and oblige everyone else to say: It Is not mine, It is hls.

Yet though we generally have no difficulty in understanding this separability, probably because the ideas of landlord and tenant are so familiar to us and because there seems to be nothing intrinsically absurd in the idea of a landlord who has renounced his right to the rent,—nevertheless, since one of the fundamental elements in the constitution of a thing as the object of right, is that it be destined somehow to the owner's utility, or good, there seema to be a lack of consistency in saying that a man has a real right when he has only the naked legal ownership. KREUTZWALD says[2]: "The proprietor who indeed does not use his house himself, but who rents it, makes use of his right of ownership by this very renting, just as much as if he made use of the house for himself. But could one to whom the right of free disposal over a thing never belonged and never will belong, still be called a proprietor? He may have a *jus in re aliena*, but he is not a proprictor"[3].

[2]Article: "Josephsehe," in: Kirchenlexikon VI, col. 1878.

[3]ALLEN TATE "Notes on Liberty and Property," in: The American Rsview (N.Y.) 6 (March 1936) 596 sq. He discusses the distinction between legal ownership and effective ownership particularly with reference to corporate holdings.

And perhaps this is the reason why it was established in Roman Law that in certain cases the *dominium utile* would revert to the owner, lest the ownership be utterly futile[4].

For it must be admitted that an absolutely naked ownership in which no good or utility whatever can be discovered or assigned is unintelligible as a right. It will be noticed that DE LUGO in speaking of the separability of direct dominion from the various other rights included in complete ownership (in the quotation given above) says that one can have the dominion "without the complete use"—not without *any* use. It does not seem that the substance of things in the world, thus stripped of all utility is capable of being the object of a right. And to this extent one can agree with KREUTZWALD[5] that a man who has no utility of any kind from an object, can hardly be called the proprietor of the object. His "relation of preference" with regard to it ceases to have any meaning. But as far as the idea of ownership is concerned the concept can be verified if the *least* utility (in the broad sense) can be pointed to, to save the relation from nugatoriness.

It would seem to follow then, that since a right to the substance must include some minimum good or utility, it, too, is in that sense a *jus utendi*, and hence it is not distinguished from indirect dominion merely by the absence of use, but rather in some other way. In other words a right to the substance implies a different kind of good or utility with regard to the object,—it does not deny all good and all utility.

What is it then that distinguishes direct from indirect dominion in the last analysis? DE LUGO tells us[6] that the proprietor's right is more *fundamental* than the usufructuary's for three reasons: first, because usually the rights of the usufructuary originate from the proprietor; secondly, because the usufruct frequently reverts to the proprietor, but never the ownership to the usufructuary; and thirdly, since the proprietor cannot be called the owner of the fruits, and since he is the owner of something, that something must be the thing itself (the substance) from which the fruits are derived.

All this goes to show that whatever right the owner has is more fundamental and hence deserves the name direct or substantial dominion, but it does not point out just what utility the proprietor with naked legal ownership retains. What has he got that makes his right a right?

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[4]Cf. LESSIUS De Just. Jur. lib. 2 c. 3 dub. 1 n. 5; Corpus Juris Civ. D, lib. 8 c. 1 De servitutibus n. 20; Instit. II, 4 De usu fructu.

[5]But to say at the same time that such a merely direct ownership "may be a *jus in re aliena*" does not make sense. If there can be a right in those circumstances at all and if the object of the right is the *substance* of the thing in question it can only be a *jus in re sua*. For it is against all usage to speak of a thing as belonging to someone else if the substance of the thing is one's own.

[6]DE LUGO De Just. et Jur. disp. 2 sect. 1, n. 9.

Perhaps the most notable use which belongs to the proprietor of an object and not to the usufructuary is the right of *consuming, destroying, alienating* the object. Since this right of destruction or consumption touches the existence and substance of an object, the person who has it is said to have a *jus in substantiam*[7].

For instance an owner sells a perpetual lease on a farm to another. He retains the ownership. Hence the lessee cannot destroy the farm by selling all the top-soil to a third party. *Per se* this right of consumption or destruction belongs only to the owner, for he has the direct dominion and right to the substance. On the other hand the owner cannot actually destroy the property himself, without injustice to his tenant, for his right of destruction is ligated; but at least he can forbid the tenant to destroy or alienate. And this negative utility (with perhaps some others which the law awards him as owner) is enough to keep his title of owner from being meaningless. Besides this right of prevention may be positively useful to him in case the useful dominion for some reason or other reverts to him. There is enough tangible utility here to justify the existence of the right[8].

It is one thing however, to say that some minimum utility is enough to make a naked right to the substance intelligible, but quite another to determine just what that minimum is[9]. And since the right to substance cannot be distinguished from all utility and good, one may well ask where is the line to be drawn between mere legal ownership and no ownership on the one hand, and between mere legal ownership and useful ownership on the other.

To us it seems that this practical question must be decided by *positive* law. The distinction between direct and indirect dominion in general is a mere matter of common sense, and is a *natural* outgrowth of human

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[7]Even this is not an absolute criterion of direct dominion. The Franciscans claimed that neither as individuals nor as an order did they have direct dominion over anything, not even over those things they consumed by use. And many great theologians uphold their contention. Cf. LESSIUS De Just. et Jur. lib. 2 c. 3 dub. 8 n. 31 sq; DE LUGO De Just. et Jur. disp. 2. n. 44; BALLERINI-PALMIERI III, De Just. et Jur. n. 228 and n. 230 sq. (by PALMIERI).

[8]HONORIUS RETT, "Die Josephsche etc"., in: Zeitschrift für katholische Theol. 32 (1908) 595 gives this example: Caius has a house that is to be auctioned. I agree to bid for it and if it comes to me to renounce all right of using it in his favor. I win the house and have the mere ownership, while Caius has the use;—but he can never alienate the house because he does not own it. Cf. also LÉPICIER De Matr. q. 5 art. 4 n. 7 and De B.V.M. pars 2 c. 3 art. 4 n. 11 for similar examples.

[9]The mere dignity of being a property owner, or the privileges awarded by the state to property owners are not enough; they suppose the right, do not constitute it.

commerce. But supposing that there is a natural basis for the distinction as indicated above, yet this basis being rather obscure and elusive, the positive law is required to give practical meaning to the distinction. *Hence the distinction in practice becomes largely a legal and arbitrary one.*

The laws of JUSTINIAN, cited above[10], show how the Roman law protected the principle that some utility must go with direct dominion. Such provisions are wise and required by the common good. In England for instance, there was a time when the divorce of legal ownership from practically all benefits of use led to legal complications and grave abuses[11]. Even now there remain in English law traces of a system in which all estates were merely titles of indirect dominion, the title to the direct dominion being considered as residing in the Crown[12]. This was a result of the system of feudal tenure. For instance, though a man had a freehold estate, (for life, or forever i.e. descending to his heirs—an estate in fee) which belonged utterly to him, he was not considered the owner but the tenant—the "holder". The owner, after the disappearance of the feudal barons, was the Crown. It is evident that this is a mere fiction nowadays and that the ownership attributed to the Crown is not a real right to the land in any sense[13]. In the case of "estates less than freehold"[14] that is, titles which give indirect dominion not forever, and not for life, but only "for years" (perhaps a number equivalently perpetual) or only "on sufferance" etc., it is somewhat easier to explain the divorce of ownership from utility. For at least there is the possibility of reversion to the "owner". He has not given up his hypothetical utility. But one can see how tenuous is the utility of the so-called owner of some of these estates.

And it is not to be supposed that it was only in England that such separation of ownership from use was pushed to the limit. There was a feudal system of tenure in many parts of continental Europe in the middle ages[15]. And some of the institutions of Roman Law made possible a nearly complete divorce of ownership from useful control. For instance an emphyteusis, (a perpetual hereditary lease with all rights of usufruct), when bought and paid for outright instead of by annual rental, left very

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[10]Cf. note 4 above.

[11]WALKER, American Law, paragr. 170 p. 376.

[12]Cf. KENT's Commentaries III, lect. 53 p. (589); VERMEERSCH Theol. Mor. II, n. 353.

[13]But even in modern times in the United States some have attempted to explain the right of eminent domain on this principle. Cf. WALKER, American Law, paragr. 131 note b, p. 314.

[14]KENT's Commentaries III, lect. 53 p. (689) sq. and IV, lect. 56 p. (89); VERMEERSCH Theol. Mor. II, n. 353.

[15]On feudal system of tenure in Europe cf. KENT's Commentaries III, lect. 53 p. (690).

little utility to the owner of the land,—who nevertheless was still considered to have a direct dominion of it. He had a "right" to the substance; the usufructuary had only the right to the use. These quasi-proprietary forms of dominion come very close to exhausting the utility of a thing which still remains in the legal ownership of another[16].

From all this one gathers the impression that the distinction between a right to the substance and a right to the use is not a clear-cut philosophical one, but rather, if closely inspected, a *legal and largely arbitrary* one. Its basis is natural. But since no one can determine practically what kind and what amount of residual utility must be left to the owner in order that he may be said to have a dominion which is not nugatory, or how completely the utilities of his possession must be exhausted by another before he is said to have lost that direct dominion, it is the positive law which must decide. And though the distinction between right to the substance and right to the use is very useful for practical purposes, it seems that the difference between these two kinds of dominion is in the last analysis a distinction between different degrees and different kinds of utility, rather than an adequate distinction between substance and use.

Now in order to see the purpose of this long analysis we must consider an objection made by some authors. It is customary to distinguish direct dominion from the various rights consequent upon it—and no one sees any difficulty in that; for instance in the case of the owner of the house who keeps his direct dominion but renounces the use in favor of another. But some say that such a distinction is impossible between *indirect* dominion and the *right to exercise* such dominion. For indirect dominion means a right to the use of a thing as distinct from the right to its substance. And to distinguish the right to use from the right to exercise the right to use is ridiculous.

We do not wish to say, of course, that it is always possible to distinguish between a *jus utendi* and a *jus exercendi juris utendi*. That is evidently impossible. But after showing that the distinction between *jus ad substantiom* and *jus utendi* is ultimately somewhat arbitrary, it is not so difficult to ask one to accept the proposition that some *jura utendi* are for practical purposes almost the same as a *jus ad substantiam*. *There are some forms of indirect dominion which in their permanent character, and in their extensive comprehension of the utilities of* on *object admit of being distinguished into o proximate right of use and one more fundamental and remote which remains even when the proximate right is taken away.* One or two examples will make this clear. It is to be noticed also, that in these cases, the fundamental right when separated from the proximate right of use, would be nugatory and meaningless unless *some* good or utility remained to the usufructuary.

The most obvious example is that of a man who subleases property on which he has a long lease. Just as the proprietor still remains in pos-

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[16]HÜRTH, De Septimo Mandato n. 92 p. 111.

session of the "substance" after making a lease—even a perpetual one—to another, (and even if he has renounced his right to the rent etc.), so the first lessee in sub-leasing remains the owner of his lease, even if he renounces his right to rent. That first lease being a thing of permanent character, is so much like a direct dominion, so fundamental in its embrace of the object's utilities that it is possible to distinguish it as a right from the more proximate right to actual use of the property. Its *actual* utility to the first lessee after he has made it over to another is slight. But he retains an interest which in some eventualities might become actually useful. The law can recognize him as a person having rights or interests in that property. To say he has a right to it or an interest in it distinguished from the actual exercise of his right of use is no contradiction. This is a case then, in which an indirect dominion—a right to use as distinguished from a right to the substance, can be further distinguished from a proximate right of use. Hence it is not so contradictory as it seems at first, to say that there are cases where a right to use can be distinguished from the right to exercise such a right. It is not contradictory because the quasi-fundamental use which is retained is different from the actual uses which are handed over to another. This could not happen in a case where a person's right of use were to a single act and to nothing else[17]. When he handed over his right to that act he would hand over the only thing he had. But as we have seen, in these rights of use which are permanent and more or less exhaustive of an object's utilities there is no contradiction[18].

But for our purpose perhaps the best example we can give is that of a slave. Supposing slavery to be not utterly repugnant to the natural law, and explaining the master's right to his slave in accordance with the principles traditional in the schools, we must admit that here, too, we have an example of indirect dominion in which right of use and right to exercise the right can be separated.

For it is a mistake to think that a master owns or ever owned the substance of his slave—even the substance of his body[19]. DE LUGO says that slavery consists in this, that one "binds over all his labor and service

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[17]Cf. PALMIERI De Matr. thes. 3 n. VI p. 25.

[18]One may object that it would be possible to institute an infinite series of sub and sub-sub-lessees all of whom would have rights. But we have already said that the positive law decides where to draw the line and declare how far rights exist when separated from their natural utilities.

[19]ST. THOMAS, it is true, (quoting SENECA De Beneficiis lib. 3 c. 20 in princ.), says that a slave's *body*, not his mind is the object of the master's right. Cf. 2, 2ae q. 94 art. 5 in corp. and ad 2; q. 122 art. 4 ad 2. But it is apparent from the same passages that he is speaking of *opera corporalia* and not of a direct dominion over a slave's body. St. Thomas would not permit a master to kill or mutilate his slave. Cf. 2, 2ae q. 64 and q. 65 art. 2 in corp.

to the master for his whole life"[20]. And again[21]: "A man cannot be the owner of himself, but he can be the owner of his operations and therefore he can sell himself and then he is said improperly to give the ownership of himself to another; but as a matter of fact he does not, properly speaking, hand over the ownership of himself absolutely but only with a view to certain of his operations; for not even the master can dispose of a slave as regards his life. . . . . etc." In other words a master's right to his slave is an *indirect* dominion; it is a right of use. We can call the person of the slave his only with regard to certain actions,—very many it is true and for life, but still not all.

And yet, no one will deny that a slave would still *belong* to his master, the master would still have a *right* to him even if he rented him out permanently to another and no longer got any use from him and renounced his right to the rent. The slave would still belong to his master even if the master could not demand a service of him without offending commutative justice, and if the slave could not render it without the same[22].

Or suppose a man owns a slave who is sick, paralyzed and useless. The master still owns him, even though he would sin against commutative justice by trying to force service from him.

And why could not a kind-hearted man *buy* such a sick slave from another owner, foreseeing that he would always be a burden on his hands. If he did buy him, in a state of society that permitted slavery, the slave would be his, in spite of the fact that he could not use him without sinning against commutative justice. For it would always remain true that the person of the slave was his; he would always have that relation of preference to it. Furthermore it would be his not in virtue of a *jus in substantiam* but only *with a view to* those very operations which he cannot demand of him without injustice. He has a right of use without the right of exercising his right[23].

And the reason is always the same: a right of use of a permanent and fundamental character can be separated from the proximate right of exercise which it naturally includes;—always supposing that there remains some minimum good or utility to give that fundamental relationship meaning. If a man can still say of a thing without offending common sense or philosophy: *It belongs to me:* he has a *right* to it.

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[20]De Just. et Jur. disp. 6 sect. 2 n. 14.

[21]DE LUGO, De Just. Jur. disp. 10 sect. 1 n. 9; compare LESSIUS, De Just. Jur. lib. 2 c. 4 dub. 10 n. 57.

[22]Cf. MARTIN PEREZ De Matr. disp. 13 sect. 6 n. 10; MASTRIUS In IV Sent. lib. 4 disp. 7 q. 5 art. 1 n. 162; q. 1 art. n. 9; DE DICASTILLO disp. 5 dub. 12 n. 156; CONINCK disp. 24 dub. 1 n. 4.

[23]Other examples: an apprentice whose services have been made over entirely to another; a moving picture actor, "owned" by one company which has an exclusive contract for his services, yet *loaned* to another company; a baseball player owned by a major league team but "farmed out" to a minor league team.

PALMIERI gives us a general principle and an illustration which go to the heart of the matter. He says[24]: "One must distinguish first between a transient and a permanent power, and then between a power with regard to an act which can produce only this very act and no other effect, and a power with regard to a certain act indeed, but which, since it is permanent, is able to effect and bring about something else consequent upon this very power with regard to the act. We grant then, that if there is question of a transient power and one from which only that one act is calculated to proceed, the acquisition of the power and obligation of not using it are not compossible: but if there is question of another, permanent power, which in addition to the act to which it is ordained and on account of this very ordination can produce some other benefit, we deny that the two cannot be combined simultaneously. In the first place, you have an example in the power of sacerdotal orders. It is indeed ordered *per se* to sacred acts, and really is nothing else than the power of sacrificing and of administering sacraments, and of performing other hierarchical acts. But since it is a permanent power, who does not see that in addition to all these acts, it begets *of itself* a certain dignity and perfection in the man so that it is a good and a desirable thing to have it even without any act. Therefore it is not repugnant that this power be conferred with the obligation of not using it, and you have an example of this, of sorts, in the case of titular bishops 'in partibus infidelium', who nevertheless are forbidden to exercise in their titular territory any act of their power and who could be forbidden to exercise such acts anywhere".

Although the example is not drawn from commutative justice, yet it is drawn from an entity of the moral order and illustrates the separability of a permanent moral power, from the right to the acts it naturally connotes.

From this study of the meaning of a radical right and the possibility of its separation into various powers and faculties, we turn to the consideration of the marriage right, and will apply to it, to whatever extent is feasible, the concepts we have analyzed. And in doing so it is important to keep in mind by way of summary the following points:

1) A right is a moral relationship of preference which enables a man to call a thing his own.
2) A right of indirect dominion, if permanent and sufficiently comprehensive can be separated from the proximate right of use which it generally includes.

Applying this doctrine to marriage we have no difficulty in understanding, then, the distinction between the radical and the proximate right to conjugal acts. For the marriage bond or marriage right is a relationship of such a fundamental, permanent and comprehensive character that it admits of being distinguished into a fundamental right

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[24]PALMIERI De Matr. thes. 3 n. VI p. 25.

of use and a proximate right of use[25]. Hence when through adultery or some other cause the proximate right to conjugal acts is gone, it is not meaningless to say that the radical right is still there.

But if a right were only a faculty it would be meaningless, or at least very confusing. One can see how difficult it would be to apply the familiar definition of a right to the situation in which the adulterous husband finds himself. We think of faculties as active principles of operations, and to say that a man has a "facultas moralis exigendi debitum" when he cannot demand it without injustice taxes understanding. But in the conception of a right as a relation the difficulty disappears. The husbands prevails over the person of his wife with a view to such acts to the exclusion of all others. He holds a place of preference with regard to her person which remains his and which no one else can take away. He can say of her *person* inasmuch as those acts are concerned: It is *mine*.

With regard to the acts themselves, as future, supposing there is no impediment to the exercise of this right, he can say of them: They are *mine*;—not in so full a sense perhaps as he can of her person, since they are future and not determined *in individuo*, but still in a very real sense, inasmuch as he has the unimpeded right to receive them from her[26].

And finally, even when by adultery or some other cause the proximate right to the acts has disappeared, he can still say of them: They are mine. For in virtue of the permanent relationship with his wife that is established in the fundamental right and bond he has acquired the power of positing those acts validly (if one may use the expression) even though illicitly[27]. That is to say, he can posit them validly *as conjugal*, and an act in which he forced his wife unjustly to have intercourse, would still not be fornication. It would be valid as conjugal. Therefore it is *his* and he still has an intelligible right to it in this sense,—namely a radical right. Furthermore it is his in the sense that no one else has a right

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[25]NOLDIN, review of LEITNER'S book in: Zeitschrift für katholische Theol. 27 (1903) 719 sq. Even if one says the marriage right is not a right of ownership but only a right of use, still one must distinguish this right of use into a *jus utendi radicale* and *jus utendi formale*—otherwise there is no explanation of cases where the proximate right ceases in marriage. And he appeals to I Cor. VII, 4 to prove this point. Cf. also LIBERIUS De Matr. disp. 6 controv. 10 n. 171: "In ipso utile dominio radicalis potestas a proxima, itidem radicale a jure proximo discriminantur". TIMLIN p. 319; HUARTE n. 172.

[26]See below p. 109 for distinction between *jus in re* and *jus ad rem*. *Note well* that the word "person" is used here to translate "corpus"; In English this is common usage legally and otherwise. The law speaks of crimes against the *person etc.* It should not be confused with the philosophical meaning of the word person.

[27]Cf. WIRCEBURGENSES VI, n. 50 on the right to place an illicit act validly.

to it, and anyone else who takes it is taking away something that belongs to him[28].

We already remarked that it would be difficult and of questionable utility, to try to apply all the terminology of property rights to the marriage right, which is *sui generis*. But at least we can attempt to clarify some of the expressions used in this connection.

First of all, the marriage right is not a right of direct dominion over the partner's person, nor over the sexual faculties of the partner's person. The expression "dominium corporis" occurs so often in the literature that one might easily get a false impression[29]. It is interesting to note in this connection KANT'S definition of marriage. He defines it[30]: "The union between two persons of opposite sex with a view to the lifelong reciprocal possession of their sexual faculties".

But we have already seen that the human body and members cannot be the object of direct dominion between man and man[31]. The authors who speak of "dominium corporis" generally mean by it indirect or useful dominion; many of them say so explicitly[32]. KANT'S definition is called crude and shameful by HEGEL[33] with whom KNECHT agrees[34]; and if it really means a direct dominion over the sexual faculties we must dissent from it[35]. But however crude its wording it could be explained

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[28]Nor can he validly alienate it by "permitting" his wife to commit adultery. His permission may remove the note of injury to himself (VERMEERSCH Theol. Mor. II, n. 575) but it cannot make the act *belong* to another.

[29]Cf. as a typical example MASTRIUS In IV Sent. lib. 4 disp. 7 q. 1; q. 3; q. 5. He continually speaks of *dominium* and distinguishes it from *usus dominii*. Such a use of the word is entirely justified of course in scholastic usage; besides it is merely another way of saying *potestas corporis* according to St. Paul 1 Cor. VII, 4.

[30]KANT, Metaphysik der Sitten, Rechtslehre paragr. 24 Gesammelte Werke V (Leipzig 1838) 83: Marriage is "die Verbindung zweier Personen verschiedenen Geschlechts zum lebenswierigen (sic) wechselseitigen Besitz ihrer Geschlechtseigenschaften". (Quoted by KNECHT p. 42 note).

[31]See above p. 58.

[32]For instance SCHMALZGR. lib. 4 pars. 1 tit. n. 225; LESSIUS De Just. et Jur. lib. 2 c. 3 dub. 2 n. 7; LAYMANN Theol. Mor. lib. 5 tr. 10 pars 2 c. 1; BALLERINI-PALMIERI VI De Matr. n. 227; TIMLIN p. 321 note 96.

[33]HEGEL, Grundlinien der Phllosophie des Rechts, Werke VIII (Berlin) (1833) 116, 223 (quoted by KNECHT p. 42 note.)

[34]KNECHT, p. 42 note.

[35]Hence we cannot agree with REBELLUS' opinion (De Just. et Jur. pars 2 lib. 2 q. 18 sect. 5 n. 51) that the partners have *direct* dominion over one another's persons. MARTIN PEREZ, too, (De Matr. disp. 18 sect. 6 n. 10) argues in such a way that he seems to hold that there is direct dominion.

in a sense which would differ very little from the definitions of some Catholics. And as for crudity it is not the only example to be found in the theological and philosophical literatura.

No; the right of the partners to one another's persons (if one must use such terminology) is a right of indirect dominion. It is a right to the person *with a view to certain acts and operations*[36]. And, in fact, for purposes of exemplification and clarification, there is no more apt parallel than that of tha slave given abova. Not that the partners are slaves of one another. The very mutuality of their subordination to one another destroys an essential note of slavery which is a one-sided subjection of one person to another. But marriaga being *sui generis*, this is the nearest illustration available. For in slavery wa have a case where one man has a permanent and rather comprehensive right to the person of another with a view to certain acts and operations[37]. Therefore it is a right of indirect dominion. And if marriage be looked at from one aide at a time we can see that in it, too, one person acquires a permanent, comprehensive, indirect dominion over another with regard to certain acts. In ancient marriage ceremonies there was a rite by which husband and wife *bought* ona another— the significanca being that the woman was *not* the man's slave, as might otherwise be auspected, but his partner[38]. It is not uncommon nowadays for authors to compare the marriage right with a *servitus*[39]. But generally the comparison is inept because they compare it to a *servitus realis*—a right of using another man's field or some such thing[40]. TIMLIN, however, calls it a *servitus* which is not real[41].

From tha analyais of direct and indirect dominion in general which we have given above, it follows that there is no difficulty in conceiving the

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[36]Cf. can. 1081 § 2 and compare MASTRIUS In IV Sent. lib. 4 dist. 7 n. 162: "Essentia matrimonii consistit in mutuo dominio et subjectione corporum *per ordinem ad usum matrimonii*"; and BILLOT De Sacr. II, p. 335.

[37]Citation from DE LUGO abova p. 59.

[38]Cf. ISIDORE OF SEVILLE, Etymologiae V, 24 P.L. 82—206: "Nam antiquus nuptiarum arat ritus quod se maritus et uxor invicem emebant ne videretur uxor ancilla". Cf. also KRIMER, IV, n. 439 who mentions marriaga *per coemptionem*. It is one of the glories of Christianity that it haa changed tha state of wifehood from one lika slavary to that of partnership.

[39]Cf. for axample LAYMANN Theol. Mor. lib. 5 tr. 10 pars 2 c. 1 n. 1: "Potestas in corpus est igitur jus utendi corpore conjugis ad opus generationis; ad eum modum quo alicui jus utendi alieno horto, aliena vacca [i] ad certum finem concedi solet."

[40] ST. THOMAS Suppl. q. 47 art. 6 in corp. refers to marriage as "Quasi quaedam servitus perpetua"; and ST. AUGUSTINE, Enarratio in Ps. 139 n. 15 P.L. 37—1959 says that a married man is "vinculis ferreis constrictus".

[41]TIMLIN p. 321 note 96.

marriage right as an indirect dominion and yet in distinguishing it into a radical right of "use" and of a proximate right of use. As NOLDIN points out[42], this distinction *must* be made in order to explain the cases in which the proximate right disappears; that it can be made intelligibly we think has been sufficiently established.

Another question the authors put themselves is this: Is the marriage right a *jus in re* or a *jus ad rem*? And they usually answer without hesitation that it is a *jus in re*[43]; for the contract is complete from the moment of consent, and the husband and wife belong to one another in the full sense from that very moment. The transfer of dominion has been made and "delivered".

But again we think a distinction is necessary. The marriage *in facto esse* can be considered both as an executory and as an executed contract[44]. As executory it imposes on the partners an obligation; namely, the obligation to conjugal acts. These acts are not determinate enough (being future) to enable them to be the object of a *jus in re*. The partners have the right to *claim* them from one another in virtue of the contract, and in this sense the right to them is rather a *jus ad rem*. And hence the contract always remains executory in regard to the acts of married life. In this sense it is not executed until death looses the bond.

But the more fundamental right in marriage, the radical right which is the bond itself, is not terminated immediately by the future conjugal acts to which it is related, but rather by the person of the partner. Canon 1081 § 2 says that the object of consent is a *jus in corpus* in ordine ad actus. . . . . " etc[45]. This fundamental right then in virtue of which the partners belong to one another from the first moment of the consent is like a *jus in re*. With regard to it the marriage contract is executed from the first moment of its existence.

But lest this be misunderstood we add: A *jus in re* is not to be confused with direct dominion;—and when we say that the partners acquire a *jus in re* to one another's persons we do not mean that they have direct dominion over one another's bodies, or over one another's sexual faculties. The right of a usufructuary to land, for example, can be a *jus in re* and yet it is only an indirect dominion. It has been a fundamental position in our analysis that the partners have only an indirect dominion, commonly, but not too accurately, called a "jus utendi". And we note furthermore, that in speaking of this indirect dominion as a right to the *person* of the partner (with a view to certain operations) we are using the word "person" in the English sense, in which, in legal language at

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[42]See above p. 61 note 25.

[43]E.g. LESSIUS De Just. et Jur. lib. 2 c. 8 dub. 2 n. 7; LAYMANN Theol. Mor. lib. 5 tr. 10 pars 2 c. 1 n. 1;

[44]Cf. Clark, Contracts Chap. I p. 1.

[45]And compare citations in note 37 above.

any rate, it means *the body*. Hence when we characterize the *radical* matrimonial right as a *jus in re* which the partners have in one another's persons, we only mean a right of *indirect* dominion, over one another's *bodies* (not "persons" in the philosophical sense), *with* o *view to* the acts of conjugal life and love..

It may be objected that in this conception we are giving to the marriage right two different objects, or to the marriage relation two different terms, namely the person-with-a-view-to-acts and the acts themselves. But what else can one do after making the distinction between the radical and proximate right? How would it be possible to distinguiah two rights at all (as we must, to explain the various cases where the proximate right is absent) without showing that there is question of rights to two different things? How can one make a distinction where there is no difference? Then too, the difference is not so startling when we remember that the fundamental right which is the marriage bond is not *any* kind of right to the partner's person, but to the partner's person under a certain aspect, namely *with a view to conjugal acts*,—as related to conjugal acts (and therefore at least fundamentally capable of them).

In this view then, strictly apeaking, it ia correct to apeak of a proximate and radical right to the *acts*, but the *jus in corpus* is not divided into proximate and radical; it ia the radical bond itself.

CHAPTER V.

CONJUGAL LOVE

In recent times the so-called reformers of marriage have written much on the relation of conjugal love to marriage, and have undoubtedly given to this element an exaggerated importance. Their views are summarized in the following quotation[1]: "Marriage originates in love, is entered because of love, is founded on and consummated in love. Wherever conjugal affection is found between man and woman, and as long as it is found[2] there is marriage; when love ceases the inclination to cohabitation and to copula cease; the right and obligation to them ought to cease too. Otherwise human liberty would be violated, personal dignity defiled, most unhappy conflicts created. The essence of marriage therefore, consists in a union of souls through conjugal love; its intrinsic end is nothing else but the enjoyment of that love; all other ends, customarily assigned, can be said at most to be *fines operantis*[3]".

Those who talk this way of course are non-Catholics, for they deny indissolubility of the marriage bond, and contradict all the teaching of tradition on the ends of marriage.

But even among Catholics we find some who while holding all the fundamental doctrines of the Church on marriage, nevertheless seem at first sight to part from tradition in the manner in which they explain the importance of conjugal love as an element of marriage. We quote ZEIGER again who thus proposes their opinions[4]: "According to BRUGI[5] the essential end of marriage consists only in the mutual help of the partners; according to MICELI[6], on the other hand, in a complement of personality, which the partners bring to one another by their opposite sexual qualities both of body and especially of mind. The essential thing in marriage then,

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[1]ZEIGER, "Nova Matrimonii Definitio?" In: Periodica etc. 20 (1931) 38*.

[2]Cf. Chap. I, note 19 for the Roman conception of marriage and *affectio maritalis*.

[3]Cf. authors cited by ZEIGER loc. cit. p. 38* note 1.

[4]ZEIGER l. c. p. 40*.

[5]BRAGIO BRUGI, "L'articolo 107 del codice civile Italiano e lo scopo del matrimonio," In: Rivista Internationale di filosofia del diritto 6 (1905) 107 sq. cited by ZEIGER l. c.

[6]VINCENZO MICELI, "Ancora sull'articolo 107 etc.," In: Rivista Internazionale di filosofia del diritto, 6 (1926) 285 sq. cited by ZEIGER, l. c.

is a union of souls in mutual, personal, spiritual love. And those points are proposed more distinctly by VIGLINO[7] and CORNAGGIA MEDICI" [8].

And yet this emphasis on conjugal love is not without some justification in tradition; for it would be a mistake to suppose that Catholic teaching has ever neglected the element of love in marriage. In fact there is no dearth of testimony from the time of Christ to the present day to show how important in the eyes of Catholic doctrine is the special love proper to married persons.

Our Lord Himself had this to say of the relations of man and wife[10]: "Have ye not read that he who made man from the beginning made them male and female. And he said: For this cause shall a man leave father and mother, and shall cleave to his wife, and they two shall be in one flesh. What therefore God hath joined together let no man put asunder".

And St. Paul's inspired interpretation of the text shows us (if it were necessary) that Our Lord here spoke of the love of husband and wife[11]. "Husbands love your wives, as Christ also loved the church, and delivered himself up for it: That he might sanctify it, cleansing it by the laver of water in the word of life: That he might present it to himself a glorious church, not having spot or wrinkle, or any such thing; but that it should be holy, and without blemish. So also ought men to love their wives as their own bodies. He that loveth his wife, loveth himself. For no man ever hated his own flesh; but nourisheth and cherisheth it, as also Christ doth the Church: Because we are members of his body, of his flesh, and of his bones. For this reason shall a man leave his father and mother, and shall cleave to his wife, and they shall be two in one flesh. This is a great sacrament; but I speak in Christ and in the church. Nevertheless let every one of you in particular love his wife as himself: and let the wife fear her husband".

ST. AUGUSTINE, though stern on the indulgence of the sexual side of love, does not neglect the factor of conjugal charity. He says, for instance, of St. Joseph, that he is not to be denied the title of father, merely because he respected Our Lady's virginity "as if lust made wifehood and not *conjugal love*"[12]. Again: "We have known many brethren. . . . . to abstain from the concupiscence of the flesh, but not from *mutual conjugal*

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[7]CAMILLO VIGLINO, "Un curioso equivoco sull'impotenza etc.," Il diritto Ecclesiastico, 34 (1923) 1 sq. cited by ZEIGER. And cf. G. AREND criticising VIGLINO in Ephem. Theol. Lov. 9 (1932) 442 sq.

[8]MONS. LUIGI CORNAGGIA MEDICI, "Dell'essenza del matrimonio etc." Il diritto Ecclesiastico 39 (1928) 398 sq. cited by ZEIGER l. c.

[9]The articles of these writers were occasioned by a dispute as to the meaning of impotence in article 107 of the Civil Code of Italy. For further literature on love as the essence of marriage cf. KNECHT p. 42.

[10]Matt. XIX, 4—6.

[11]Ephes. V, 25 sq.

[12]Sermo de SS. n. 51 P.L. 38—344.

love. . . . . Are they not spouses who live thus?"[13]. And in another place he says the bond of matrimony is all the stronger when conserved "not by the voluptuous ties of the body but by the voluntary affections of the soul"[14]. And again[15]: "Nuptiarum igitur bonum semper est bonum sed in populo Dei fuit aliquando legis obsequium, nunc est infirmitatis remedium, in quibusdam vero *humanitatis solatium*"[16].

ST. THOMAS, taking for granted the duty of conjugal love, discusses merely the question whether a man should love his wife more than his father and mother. And he replies[17]: "Gradus dilectionis attendi potest et secundum rationem boni, et *secundum conjunctionem ad diligentem* . . . . . Secundum autem rationem conjunctionis magis diligenda est uxor: quia uxor conjungitur viro ut una caro existens, secundum illud Matt. XIX, 6: Itaque iam non sunt duo, sed una caro. Et ideo intensius diligitur uxor, sed major reverentia est parentibus exhibenda".

The Council of Trent, after reaffirming the exclusivity and indissolubility of the bond of matrimony, goes on to take notice both of the natural love which the sacrament presupposes, and the supernatural grace which sanctifies that love[18]: "Gratiam vero, quae *naturalem illum amorem perficeret*, et indissolubilem unitatem confirmaret, coniugesque sanctificaret: ipse Christus, venerabilium sacramentorum institutor atque perfector, sua nobis passione promeruit. Quod Paulus Apostolus innuit, dicens: Viri, diligite uxores vestras. . . . . " etc.

The Catechism of the Council of Trent says[19]: "Quare docendum est hujus Sacramenti gratia effici ut vir et uxor *mutuo charitatis vinculo coniuncti* alter in alterius benevolentia conquiescat, allenosque et illicitos amores et concubitus non quaeret. . . . . " etc. And again[20]: "For matrimonial faith demands that husband and wife be joined in an especially holy and pure love. . . . . " etc.

LEO XIII in the Encyclical "Arcanum Divinae Sapientiae" echoes the words of the Council of Trent[21]: "Apostolis magistris accepta referenda sunt, quae sancti Patres nostri, Concilia et universalia Ecclesiae traditio

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[13]Ibid.

[14]De Nupt. et Concup. I, c. 11 (n. 12) P.L. 44—420.

[15]De Bono Vid. c. 8 (n. 11) P.L. 40—437.

[16]Cf. also De Serm. in Mont. I, c. 14 (n. 39) P.L. 34—1249; Contra Faust. XXIII, c. 8 P.L. 42—470, 471; De Bono Conjug. c. 3 (n. 3) P.L. 40—375.

[17]2, 2ae q. 26 art. 11 in corp.; and compare ST. JEROME, Epist. 117 P.L. 22 n. 786 (col. 956): "Non superat amorem patria et fratris nisi solius uxoris affectus".

[18]Conc. Trid. Sess. 24 c. 1 de reform. matr. Denzinger n. 989 sq.

[19]Catechismus Romanus II cap. 8.

[20]Catechismus Romanus II cap. 8.

[21]10 Feb. 1880 Denzinger n. 1858.

semper docuerunt, nimirum Christum Dominum ad sacramenti dignitatem evexisse matrimonium simulque effeciase, ut coniuges coelesti gratia, quam merita eius peperunt, saepti ac muniti, sanctitatem in ipso coniugio adipiscerentur: atque in eo, ad exemplar mystici connubii sui cum Ecclesia mire conformato, *et amorem, qui est naturae consentaneus, perfeciase*, et viri ac mulieris individuam suapte natura societatem divinae *caritatis vinculo* validius coniunxisse".

Among modern writers DE SMET has this to say of conjugal love[22]: "We have seen that from the primary end of marriage one must infer that the marriage bond involves for the partners the right and obligation to the marriage act, to the education of the offspring if it is conceived, and also to a sharing of bed and board. Now the community of life, so close and intimate, which is thereby imposed on the partners, is unintelligible . . . . . and. . . . . *teste experientia* will not remain firm without a *really intimate union of souls based on enduring love*. . . . . Besides nature inclines to the aforesaid mutual love, moved by which the husband is spontaneously taken up with love of his wife, and vice versa; and under the influence of this love they will seek to be of help and assistance to one another. The marriage act itself, by which the partners are made one flesh, cultivates and nouriehes this love also, and the children conceived of the mutual union, being as it were the fruit and earnest of love, are a strong encouragement and confirmation of it".

VERMEERSCH[23]: "But at the same time [that marriage seeks its primary end through the marriage act] *that loving union* of the two persons to which love aspires indicates another natural cause of contracting, which is not secondary and which is contained in the definition of the Roman law in which marriage is described 'viri et mulierie coniunctio, individuam consuetudinem vitae continens. . . . ." etc. And again in his marginal summary to the same number[24]: "The object of the contract is the mutual surrender of their persons for a strictly sexual union, and *therefore a mutual giving of themselves which requires to be made out of love.*"

Among the most important witnesses to the high regard in which the Church holds conjugal love as an element in marriage are the diocesan Rituals. These authorized books give the form in which consent is asked and given in the Church to-day, and has been given for many years past. Most of them contain instructions or exhortations on marriage written in the vernacular. And from them we can learn what concept of marriage the Church actually proposes to the contracting parties at the moment they give their consent. We have selected a few examples (which could be multiplied) in which the element of love is clearly emphasized.

We already called attention above to the promises of fidelity used in English-speaking countries[25]. In the United States, before consent is

[22] DE SMET n. 269.
[23] Theol. Mor. IV, n. 41.
[24] Theol. Mor. IV, n. 41.
[25] Above Chap. II, p. 35.

asked, the priest reads an exhortation in which the burden of the discourse is an insistence on the duty of conjugal love. ". . . . . Henceforth you will belong entirely to each other; you will be one in mind, one in heart, one in affections. . . . . No greater blessing can come to your married life than a pure conjugal love loyal and true to the end. May then this love with which you join your hands and hearts today never fail but grow deeper and stronger as the years go on"[26].

The prayer used for the marriage ceremony in the Ritual of the Archdiocese of Cologne reads as follows[27]: "Omnipotens sempiterne Deus, qui primos parentes nostros Adam et Evam tua virtute copulasti eosque tua benedictione sanctificasti et in sancta societate conjugasti: tu ipse corda et corpora famulorum tuorum benedic et sanctifica atque in *societatis et amore verae dilectionis conjunge*. Per Christum etc."

The *Manuale Osnabrugense*[28]. In asking consent the priest asks the husband if he intends to love his wife as Christ loved the Church; and asks the wife if she is willing to be subject lovingly to her husband as the Church is to Christ. After giving consent in these terms they exchange the wedding rings and are told that this is a pledge of the love and fidelity they have just vowed. Then they join hands and the Ritual tells them through the mouth of the priest that this joining of hands means that they are bound as by a sacred oath never to part but to persevere until death in inseparable love.

The *Rituale Strigoniense*[29]. Immediately after consent the parties lay their hands on holy relics and *swear that they love one another*, that they take one another for husband and wife and that they will remain faithful until death. This is followed by an exhortation which echoes the same refrain of love for one another as Christ loved the Church[30].

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[26]The Priest's New Ritual p. 208. After the ceremony (p. 216) there is another exhortation (not generally used nowadays) in which love is again stressed as a duty of conjugal life.

[27]Collectio Rituum Archidioc. Coloniensis, tit. 5 c. 3 n. 8 ad fin. p. 74.

[28]This is the ritual used in the diocese of Osnabrück in Germany. Cf. c. 12 p. 127, 129 etc.

[29]This is the Ritual used in the diocese of Gran in Hungary. Cf. tit. 7 c. 2 n. 14 p. 289.

[30]Compare the exhortation (taken from ST. AUGUSTINE) in the Manuale Toletanum (Tit. De Matr.); this is the Ritual used throughout Spain and in Spanish-speaking countries elsewhere. Cf. also the Layfolk's Ritual (containing the rites used in England in the vernacular); and MARTÈNE, De Antiqua Ecclesiae Ritibus tom. 1 lib. I c. 9 art. 5 Ordo VII, X, XI; also Ordo XIII where the form of consent is a promise to love the partner as one's self; The Book of Common Prayer (Solemnization of Marriage) asks consent as follows: "Wilt thou have this woman to be thy wedded wife to live together after God's ordinance in the holy estate of matrimony? Wilt thou love her, comfort her, honor and obey her, in sickness and in health. . . . . etc."

The point we wish to make is that in these books not only is love proposed as important to marriage but as being in some sense inseparable from it.

Finally, the most important witness of all to the Church's esteem for conjugal love is the "Casti Connubii" itself. But since we will quote the pertinent passage in full at the end of this chapter we need not give it here.

These testimonials prove abundantly that at least the Catholic tradition has not neglected the importance of love as an element of marriage. But it is one thing to say that love is an important element and another to say that it is essential, or *the* essential element. And in order to discuss this latter question profitably it is necessary to define more accurately what is meant by conjugal love.

Love may be either natural or supernatural. We speak of it here in the natural order; because we wish to discuss its relation to marriage considered principally as a natural institution.

Love may be considered as an act or a habit. We speak of the habit, because in discussing the relations of love to marriage it is evident that the question regards some more or less permanent disposition of love[31].

Love may be considered as a habit of the sensitive or of the rational appetite. We will speak of a love of the rational order, as befits a rational being. Not that the natural activities of the sensitive appetites do not also befit rational beings. The exercise of sensitive appetites by human beings is natural to them and in itself involves no inordination. In fact, in the case of conjugal love it would be a mistake to contemn those natural instincts, and that natural love of the sensitive order which play so important a part in all human relations. The love of man and wife to be complete should include not only a rational and not only a sensitive but a sexual inclination to one another[32]. So we do not intend to say, when we restrict our question to the rational appetite, that sensitive elements have no place in marriage. But we mean that they of themselves cannot be an essential part of marriage for rational beings[33]. They are too fleeting and uncontrollable to be of the essence of permanent union. And such love if taken alone, hardly merits the noble name of conjugal love at all. It is too much like the casual unions of animals. We speak therefore of a love of the rational order which may or may not include a redundance in the sensitive appetite, (and which to be integrally perfect ought to include such a redundance).

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[31]Sometimes the word "love" is used to describe an instinct or even a mere *appetitus naturalis*. We do not use the word in this sense.

[32]The importance of the sexual element should not of course be exaggerated. In recent years Rome has had occasion to condemn such exaggerations.

[33]ZEIGER, article: "Nova Matr. Definitio?" in: Periodica, etc. tom. 20 (1931) p. 46*.

Love according to ST. THOMAS, is given this general definition: Amare est velle alicui bonum[24]. The love of friendship can be defined as: The virtue by which two or more persons wish to communicate benefits to one another. And applying the definition to conjugal love (since this is evidently a love of friendship): *Conjugal love is the virtue by which man and wife wish to communicate to one another the benefits proper to marriage.* And explaining the definition:

Virtue: that is, a natural permanent disposition of the rational order,—though as explained above we do not exclude sensitive and sexual appetites from the field of conjugal love. But we speak here of what is essential. We call it a virtue first to distinguish it from mere *acts* of conjugal love and secondly, because it is a natural virtue in the ordinary sense of that word[25].

Man and wife: for the love we speak of is mutual. It is a love of friendship primarily, although like every love it necessarily includes love of concupiscence[26]. We say between man and wife because thus the *subject* of conjugal love is distinguished from other loves of friendship.

Wish to communicate benefits to one another: for all love is a tendency to union. Real union is the effect of love. But love itself is a *tendency* to union; it is an affective union[27]. By the very fact that one desires to communicate a good thing to *another* (—principally to another, not to one's self—) one's act terminates in that other person. This is the affective union of which we speak. It means a tendency to be one with another to a greater or lesser extent. Hence by the phrase "wish to communicate benefits to one another" we imply that acts of love tend not only in the good thing desired for the beloved but in the beloved himself[28].

Benefits proper to marriage. It is of the nature of love to wish to give good things to the beloved. But we do not think conjugal love is sufficiently distinguished from other loves merely by saying that husband and wife desire to communicate any kind of good thing to one another. Any act of love whatever between husband and wife helps, it is true, to

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[24]1, 2ae q. 26 art. 4 in corp. citing ARISTOTLE, Rhetor. lib. 2 c. 4 n. 2.

[25]BILLOT, De Virtutibus Infusis 1, p. 1 sq.

[26]Cf. LERCHER II, n. 226 and IV, n. 114, 124 explaining ST. THOMAS 1, 2ae q. 26 art. 4 in corp.: ". . . . . motus amoris in duo tendit; scilicet in bonum quod quis vult alicui, vel sibi vel alii: et in illud cui vult bonum. Ad illud ergo bonum quod quis vult alteri habetur amor concupiscentiae; ad illud autem cui aliquis vult bonum habetur amor amicitiae". And cf. CAJETAN in h. l.

[27]ST. THOMAS, 1, 2ae q. 25 art. 2 ad 2; q. 28 art. 1, in corp. and ad 2. Compare also 2, 2ae q. 27 art. 2 in corp.: "Amor. . . . . importat . . . . . quandam unionem secundum affectum amantis ad amatum in quantum scilicet amans aestimat amatum *quodammodo ut unum sibi* vel *ad se pertinens*, et sic movetur in ipsum".

[28]Cf. LERCHER II, n. 226 and IV, n. 114, 124.

strengthen the conjugal bond and may be made conjugal perhaps by the intention of the partners. But it does not seem, for instance, that a Christmas-gift which a wife makes to her husband is necessarily an act of *conjugal* love even if it is given lovingly. In other words conjugal love must be distinguished from other love not only in the persons loving and loved, but also by the kind of good or benefit, which, through love, they desire to give one another. The fact that a man loves his wife in any way at all is undoubtedly a virtue, and in an imperfect sense can be called the virtue of conjugal love. But we take conjugal love to mean something more. It refers to an interchange of *conjugal* benefits. Hence we say in the definition: "benefits proper to marriage".

What are these benefits (bona) which conjugal love as distinct from every other kind of love wishes to communicate? They can be nothing else than the *acts of conjugal life;* that is, the marriage act and the acts of mutual help. These are the benefits marriage is calculated to produce (the *bona acquirenda*) ; these are the ends for which marriage was instituted[39]. For considering marriage *in facto esse* the only assignable elements are the bond, consisting of rights and obligations, and the ends, to which the rights and obligations are directed[40]. And in the conjugal love which is proper to marriage as a state it is not by giving the *bond* to one another that the partners desire to show their love,—they have already given that for better or for worse. The essential marriage bond is a benefit undoubtedly, and a conjugal benefit. The elements that make it up are the *bona constituentia* of marriage. But as a good thing lovingly given it pertains to the marriage *in fieri*. When the partners gave their consent to the bond that was indeed an act of conjugal love. But that act of love is past and gone now that they are married. The bond is there and they can no longer give or take it away from one another. We are looking at conjugal love which is proper to the *state* of matrimony and we say that this love can actuate itself only by a communication of the acts of conjugal life, which are the ends for which the bond was instituted. These are the *bona acquirenda* of marriage.

And what acts can be imagined which could more perfectly serve the purpose of love than these? In the marriage act there is a living *union* of the most intimate and comprehensive kind,—a union of body and mind, of sense and heart. When properly performed it is an act not only of the rational love of benevolence and concupiscence, but also of sensitive and sexual love. It is an act of self-surrender in which two become one flesh,

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[39]The *tria bona* understood in the broad sense as ST. AUGUSTINE usually understood them i.e. inasmuch as they include the actualization of the ends of marriage, are the benefits of marriage to which we refer here. Cf. above Chap. II, p. 38.

[40]Notice that we are leaving the sacramental aspect of marriage—in the supposition that the bond may be a quasi-permanent sacrament—out of consideration.

one principle of generation. Love desires union with the beloved by a communication of good. Can one discover a more appropriate act for the expression and fulfilment of love than the marriage act?[41]

Likewise the acts of mutual help are by their very nature suited to be acts of love. We do not attempt to say just what they are or how many they are but we are tempted to extend rather than restrict the concept. In any case it will probably be admitted that mutual help includes the acts of cohabitation and the acts by which the life-long partnership and the education of the children are realized. It means a *sharing* of one another's lives in this work to which the very instinct of parental love impels father and mother. Are not these acts eminently suitable expressions of the virtue of love—which seeks the presence of the beloved, and desires to benefit the beloved even at the expense of self?[42]

Since therefore, there are no other assignable "benefits proper to marriage" and since the acts of conjugal life are eminently appropriate as expressions of conjugal love, we conclude that these acts are the benefits which the virtue of conjugal love of its nature seeks to communicate. It is too evident, perhaps, to need confirmation.

This then, is our concept or definition of the virtue of conjugal love. And so, understanding our terms thus, we are ready to enewer the question proposed: Is this virtue essential to marriage?

The answer of course must be in the negetive. The ectuel virtus of conjugal love is not essential to marriage. How many thousands of marriages there are where we find no trace of it. Yet they are real merrieges. The actual virtue of conjugal love ie no more essential to marriage then the acts of conjugal life themselves. Juet as there can be true marriage where the acts of conjugal life ere absent so also there can be true marriage when the love of which these acts should be the expression is absent.

But on the other hand, just as there can be no true marriage without the radical right and obligation to the acts of conjugal life, so also the *radical right and obligation to the virtue of conjugal love is essential to marriage.*

For it is enough to consider these acts of conjugal life in themselves to see that they must suppose the virtue of conjugal love, if they are to be placed in a manner worthy of human dignity. Above, when trying to give the distinguishing note of conjugal love, we said that supposing there is such a virtue it could find no more *appropriate* expression than in the acts by which the ends of marriage are realized. Now we turn about and argue the other way, and say that in the auppoaition that there is a right and

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[41]Cf. notes 22 and 24 above.

[42]St. Thomas, 2, 2ae q. 25 art. 7 in corp., (citing ARISTOTLE, Ethic. lib. 9 c. 4); "Unus quisque enim amicus primo quidem vult suum amicum esse et vivere; secundo vult ei bona; tertio operatur bona ad ipsum; quarto convivit ei delectabiliter; quinto concordat cum ipso quasi in eisdem delectatus et contristatus". and cf. 2, 2ae q. 27 art. 2 ad. 3; q. 31 art. 1 in corp.

obligation to these acts, there must also be a right and obligation to practice them *lovingly*. In other words they are not merely appropriate expressions of love, but they are *necessarily* expressions of love. They are so typically acts of love that one cannot imagine an obligation to them which does not presuppose that they be acts of the virtue of love.

We do not say that it is impossible that a man or woman perform these acts without love. It is possible to perform the marriage act, and the acts of life-long mutual help merely externally with inner reluctance, —and more than reluctance, with inner hatred.

But we say that it would not be in keeping with the personal dignity and rational nature of man to say that he is *obliged* to these acts except as proceeding from the virtue we have described. The acts of married life are to be performed in a manner consonant with the human dignity of the partners. They are not mere animal acts. They are not merely the legal fulfillment of a contractual obligation. They are such an intimate fusion of two human personalities and they connote such a complete surrender of person to person that, we repeat, they cannot be conceived as real *human* acts, unless they are conceived as acts proceeding from the love of friendship and benevolence defined above. And since marriage makes these acts radically obligatory, so also it must make the virtue from which they proceed radically obligatory. Hence we say that the radical right and obligation to the virtue of conjugal love is essential to marriage[43].

Let us recall a statement which we quoted when treating of marriage consent and the union of souls it implies: "Matrimonial consent differs greatly from other contracts by its *object*. A man and woman deliberately and freely give themselves to one another for a complete intimacy of their whole life, an intimacy both bodily and interior, and this forever and exclusively. . . . Such a surrender if considered fully in itself, cannot but suppose at least a certain inchoate and imperfect love; while the free consent to that surrender is an external expression of that internal love,—is the love itself"[44].

We apply this same conception to marriage *in facto esse*—which essentially consists in rights and obligations,—and paraphrasing the words above say: The right and obligation to such a surrender (as the acts of conjugal life involve) cannot but suppose the right and obligation to at least some virtue of conjugal love. If it is true of the marriage *in fieri* it is also true of marriage *in facto esse*. For the acts from which the argument is derived are the same in both cases.

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[43]Cf. VERMEERSCH, Theol. Mor. IV, n. 41 margin: "Objectum contractus est mutua corporum traditio ad stricte sexualem unionem *ac proin* mutua donatio sui, *quae postulat ut fiat ex amore.*"

[44]See Chap. II, note 18. Compare G. AREND: "De genuina ratione imped. impot." in: Ephem. Theol. Lov. 9 (1932) 54; he notes "elementum amoris conjugalis—quatenus illa unio intelligitur vinculum animorum habens copulam carnalem ut sui expressivam".

One may conclude incidentally, that there is a grain of truth in the statement of the marriage reformers (as there is a grain of truth in every error): Marital intercourse is immoral when love has ceased. It is true in the sense that the acts of conjugal life are not performed in a manner worthy of human dignity ("natura humana complete spectata") unless they proceed from love.

But it is false in the concept it has of love; for the reformers generally mean instinctive sexual attraction, if not principally and exclusively, at least essentially. And their whole principle is based on the idea that love comes and goes as it will. It is not something that man controls. He *falls* into it and hopes it will last.

Our concept of love on the contrary, though it does not deny the importance of instinctive, physical, sensitive, and sexual factors, is a love of the rational order. Those other factors may have been the occasion which gave rise to the love we speak of, and they are certainly of immense help in conserving and strengthening it as far as the natural order is concerned. But what is essential to conjugal love is voluntary. It is a virtue. And just as it is within our power to practice the virtue of charity towards all, so it is possible for man and wife, despite the vagaries of passion and sentiment, to practice the essential virtue of conjugal love. There is an Italian proverb which says: "L'amore non si comanda". Nevertheless there is a law of God which commands it. For the love of God is the "greatest and first commandment"[43], and the second is the love of the neighbor.

Another consideration will help us to establish our point. The radical right and obligation to acts of *mutual help* are essential to marriage. (We have already proved this). Now although there may be some doubt of the extent of the concept "mutual help", there is no doubt that it at least includes the idea of conjugal love. Both theologians and canonists explain mutual love as a part of mutual help or mutual help as a part of mutual love. CAPPELLO, for instance, says that the secondary end of marriage, essential and intrinsic to it is mutual help, "not only in the care of the household but *especially in mutual love*"[44]. And thus the authors generally[45].

The "Casti Connubii" tells us that the outward expression of love in the home comprises not only mutual help, but also the care of one another's interior perfection; and it puts the cultivation of mutual love on a par with mutual help as a secondary end of marriage. It says[46]: "For in matrimony as well as in the use of the matrimonial rights there are also secondary ends, such as mutual aid, *the cultivating of mutual love*, and the quieting of concupiscence".

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[43] Matt. XXII, 36.

[44] CAPPELLO De Matr. n. 9.

[45] Cf. e.g. WERNZ-VIDAL V, n. 26; VERMEERSCH Theol. Mor. IV, n. 41 etc., etc.

[46] "Casti Connubii" AAS 22 (1930) 561.

Now when authors and documents speak of love as a part of mutual help it is not to be supposed that they intend that *among* the acts of mutual help there are *also* acts of love;—as if every so often a man ought to present his wife with an act of love. Nor, when speaking of love as part of mutual help, do they intend to exclude the marriage act itself from the concept of mutual help. It is often included, as we have seen[49], and in the passage just quoted from the "Casti Connubii" it is the marriage act which is mentioned as a means of cultivating mutual love. For they conceive conjugal love as something that goes along with all the acts of conjugal life; it is a permanent disposition that pervades these acts, and is like a *property* of them. They mean what the "Casti Connubii" says so explicitly[50]: ". . . . this love of husband and wife which *pervades* all the duties of married life and holds pride of place in Christian marriage". And again[51]: "By this same love it is necessary that *all the other rights and duties of the marriage state* be regulated so that the words of the Apostle, 'Let the husband render the debt to his wife, and the wife also in like manner to the husband' *express not only a law of justice but a norm of charity*".

We argue then, from this common opinion of the authors, and draw a conclusion from it which not all of them draw[52]: If the acts of mutual help are essential to marriage and if love pertains to these acts as an all-pervading property, then the love is essential to marriage just as the acts are; that is to say, the radical right to the acts essentially implies the radical right and obligation to the virtue of love.

Nor should we conclude that this doctrine imposes new obligations on the partners that no one has ever heard of before. We would not say (as the reformers do): it is wrong for a man to have intercourse with his wife if he does not love her. For people would certainly misunderstand this. But we would simply say (without laying claim to much originality): "Husbands, love your wives"; and again: "Let the husband render the debt to his wife, and the wife also in like manner to the husband"[53]. In other words everyone has always been agreed as to the obligation that the partners have to love one another in marriage and to perform the acts of marriage lovingly[54]. Our point has been merely to give a definition of what to us seems to be essential in that virtue and then to show in what sense the virtue is essential to marriage. It is essential in the sense that the radical right and obligation to it is essential.

But one may object that people can and often do get married without loving one another. Who would say that a young man who marries a rich

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[49]See above p. 20.

[50]"Casti Connubii" AAS 22 (1930) 547.

[51]"Casti Connubii" AAS 22 (1930) 549.

[52]Not all of them, perhaps, hold the radical right to acts of mutual help to be essential.

[53]Ephes. V, 25 and I Cor. VII, 3.

[54]Cf. testimonies above beginning p. 67.

lady for her money loves her? Who would say that a prince who marries for reasons of state—because he must—loves his bride? Do not common sense and the man on the street agree that this is the very opposite of love? If you were to ask the young man or the prince: Do you love her?—they would unhesitatingly answer: No.

The rejoinder to these young men would be: But you *ought* to. For we are talking about an *obligation* which is essential to marriage. We do not say the love itself is essential. Furthermore, we have to repeat: we are not talking of fiery passion and sentimental romance. We are not talking of the kind of love people *fall* into. We are not talking of the love of the silver screen. The encyclical "Casti Connubii"[35] says of the marriage reformers: "These enemies of marriage go further, however, when they substitute for that *true and solid love* which is the basis of conjugal happiness a certain vague compatibility of temperament. . . . . What else is this than to build a house upon sand"? Our answer to the objection then is that we are not talking of sentimental romance; and if the prince and the young man have not that minimum of love which is contained in the definition we have given, and which we conceive to be the true and solid love of the encyclical, whereby they desire to communicate to one another the benefits of conjugal life, then their intention in marrying is usually sinful and possibly invalid.

Usually sinful, we say, because to have an intention contrary to one's obligations in marriage is sinful. But we put the proviso "usually" because one must not lose sight of the fact that it is only the radical right and obligation to conjugal love that we consider essential to marriage. There are many occasions in married life when the proximate obligation to practise this virtue ceases. For instance when the partners are legitimately separated, or when both partners enter religion. In these cases they are still bound to love one another it is true, but as Christians, not conjugally. Hence we do not exclude the absolute possibility (though we consider it very remote) of a valid marriage in which the parties when contracting assume only the radical rights and obligations of marriage and none of the proximate ones. If such a case were possible then there might be no sin in omitting the virtue of conjugal love from one's explicit intentions. In other words *if* it is possible to get married without the proximate right and obligation to any conjugal acts, then it is possible to get married without the proximate right and obligation to the love from which those acts should normally proceed.

Possibly invalid, we say, because if our doctrine is true, then a *condition* excluding essential conjugal love from the contract, an *intention* to exclude it, if it really meant to exclude even the *radical* obligation to such a virtue would be against the substance and would invalidate marriage. But such a case is purely fantastic. For practical purposes such conditions would be exclusive of the right to the acts of conjugal life in themselves.

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[35] "Casti Connubii" AAS 22 (1930) 568.

not against the right to them as proceeding from the virtue of conjugal love. Can one imagine a condition like this in practice: I marry you on condition that our acts of conjugal life shall not proceed from a desire to communicate to one another the benefits of marriage. This is preposterous. But we mention the question of conditions merely to show that when we say that the radical right to the virtue of conjugal love is essential, we mean it in just the same way as when we say the radical right to the acts of marriage is essential. That is, so essential that "if anything to the contrary were expressed in the consent that makes the marriage, it would not be true marriage"[56].

From all this it will be seen that we would have no hesitation in putting the element of conjugal love in the very definition of marriage. We would not object to a definition which included the notion of love understanding it in the sense we have explained. But of course for juridical purposes, it is more necessary to insist on the *acts* of conjugal life rather than on that essential property of the acts.

The mention of the juridical aspect of marriage brings up a possible difficulty. Why is it, if love is essential in any way to marriage that the Code and canonical authors pass it by—for that matter why do we not hear more of it in theology?[57].

As for the canonists, the reason is clear. "It is very much to the interest of society and its authority to judge, watch over, defend, and correct the marriages of its subjects. But this activity can reach only those things which appear externally in a juridical form. Accordingly, for reasons which are practical and really necessary, the whole attention is directed to the juridical elements of matrimony since they are external and palpable. It does not take notice of conjugal love which is exposed to so many fluctuations"[58]. And as we have seen, inasmuch as this element could have juridical repercussions in practice, it is taken care of by the laws that govern the acts of conjugal life themselves. When canon law provides for the acts of conjugal life it is providing for the acts of conjugal love—for they are one and the same.

Then with regard to theology in general, Christian authors addressing Christians were not under the necessity of making a special effort to show how important the element of love is, because for Christians in every state of life love is always essential. Christians are bound to love not only father, mother, husband or wife, but even their enemies with the love of

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[56]"Casti Connubii" AAS 22 (1930) 542 quoting ST. THOMAS Suppl. q. 49 art. 3.

[57]The charge is sometimes made (even by Catholics) that Catholic theology does not recognize conjugal love and does not give it its proper place in marriage. This complaint can only be explained as due to ignorance of Catholic theology. The "Casti Connubii" gives us the *traditional* theology of the Church on this point.

[58]ZEIGER, "Nova Matr. Definitio?" in: Periodica, etc. 20 (1931) p. 52*.

Christian charity. It is not strange, then, that when dealing with the obligations of the married state authors do not make a point of saying that love is *essential* to it, since love is essential to every state for a Christian[88]. And just as in other states of life the virtue of Christian charity shows itself in the practice of obligations peculiar to those states, so the love of husband and wife has its special character from the special obligations of marriage. And in addition the obligations of marriage have this peculiarity—as we have seen—that they can *only* be worthily fulfilled when they proceed from love.

Besides we consider it an error to say that this doctrine is not contained in traditional theology. Explicitly perhaps one will not find it stated as stated here. But implicitly the essential relation of conjugal love to marriage has been part of the tradition. Read again the words of St. Paul to the Ephesians, the words of Augustine, of St. Thomas, of the theologians and moralists whose testimonies we have given above. Read especially the Rituals and the semi-official instructions they give to the newly married pair. It is too much to ask us to believe that all this insistence on love by Holy Scripture, the Fathers, the Rituals, and the theologians is merely for an element which is in no way essential to marriage[89]. We consider that the explanation of that essentialness given here fits into this tradition and makes sense of it.

Nor do we think the common sense view of people getting married (and others) is to be neglected. They may know nothing about rights and essences, and have a faulty idea of love, but they are agreed at any rate that some kind of love is the *principal* thing in marriage. One of these people might be tempted to say of our view that by the time it is explained there is a rather thin sense in which we make love essential to marriage and a pretty well-watered sense in which we understand love itself. The answer is that we make love just as essential to marriage as those all-important elements, the marriage act, and the acts of mutual help,—which should be essential enough. As for our concept of love, it is that of St. Thomas and the scholastic tradition. It is naturally not strong drink for those who have been brought up on the fire-water of motion picture romance. But we consider it the "true and solid love" of which the "Casti Connubii" speaks.

Finally, this explanation receives strong confirmation from the beautiful words with which the "Casti Connubii" speaks of conjugal love. For the encyclical says that this love is a part of conjugal faith; it is *demanded* by

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[88] "Casti Connubii" AAS 22 (1930) 548 treating of conjugal love refers it also to the love of the neighbor ". . . . . ita ut per mutuam vitae consortionem in virtutibus magis magisque in dies proficiant et praecipue in vera erga Deum *proximosque caritate* crescant in qua denique 'universa lex pendet et Prophetae' (Matt. XXII, 40)".

[89] The fact that they are talking of *supernatural* love does not weaken the argument. The supernatural presupposes the natural. Cf. the words of the Council of Trent and of Leo XIII quoted above p. 68.

conjugal faith;—and conjugal faith of course is essential to marriage. Furthermore it says that it is *necessary* that this love regulate and pervade the other rights and duties of marriage. From this we conclude that there is some sense in which love is essential to marriage, and we are convinced that our explanation of it, fits aptly into the doctrine of the encyclical. We have already drawn an argument from the fact that the encyclical makes the cultivation of mutual love a secondary end of marriage[61].

We cannot end this part of our essay better than by quoting the words of the encyclical[62]:—

"This conjugal faith, however, which is most aptly called by ST. AUGUSTINE the 'faith of chastity' blooms more freely, the more beautifully, and more nobly when it is rooted in that more excellent soil, the love of husband and wife, which pervades all the duties of married life and holds pride of place (principatum nobilitatis) in Christian marriage. For matrimonial faith demands that husband and wife be joined in an especially holy and pure love, not as adulterers love each other, but as Christ loved the Church. This precept the Apostle laid down when he said: Husbands love your wives as Christ also loved the Church:—which of a truth He embraced with a boundless love, not for the sake of His own advantage, but seeking only the good of His spouse[63].

"The love then, of which we are speaking is not that based on the passing lust of the moment nor does it consist in pleasing words only, but in the deep attachment of the heart which is expressed in action, since love is proved by deeds[64]. This outward expression of love in the home comprises not only mutual help but must go further, indeed must have its primary purpose that man and wife help each other day by day in forming and perfecting themselves in the interior life; so that through their partnership in life they may advance ever more and more in virtue, and above all that they may grow in true love towards God and their neighbor, on which indeed, 'dependeth the whole law and the prophets'[65]. For all men, of every condition and in whatever honorable walk of life they may be, can and ought to imitate that most perfect example of holiness, placed before man by God, namely Christ our Lord, and by God's grace to arrive at the summit of perfection, as is proved by the example of many saints.

"This mutual interior formation of the partners, this earnest desire of perfecting one another, can be said in a certain very true sense, as the Roman Catechism teaches[66], to be the primary cause and reason of marriage,—if only marriage is taken, not strictly as an institution for the

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[61] See above p. 76.

[62] "Casti Connubii" AAS 22 (1930) 547 sq.

[63] Catechismus Romanus II, c. 8 q. 24.

[64] Cfr. S. GREG. M. Homil XXX in Evangel., (Joan XIV, 23-31) n. 1.

[65] Matt. XXII, 40.

[66] Cathechismus Romanus II, c. 8 q. 13.

proper procreation and education of children, but in a broader sense, as a sharing, a community, a union of their whole life[67].

"By this same love it is necessary that all the other rights and duties of the marriage state be regulated so that the words of the Apostle, 'Let the husband render the debt to the wife, and the wife also in like manner to the husband'[68], express not only a law of justice but a norm of charity."

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[67]For the interpretation of this passage note the following: HÜRTH, De Statibus, n. 140 refers this "primary cause and reason" of marriage to the motive of the contracting parties rather than to an *end* to which marriage is objectively and essentially related; NOLDIN, Theol. Mor. III (Edit. 23 by SCHMITT) n. 504 says that even when marriage is taken in the narrow sense it still has all three essential ends —therefore even in the narrow sense it would include mutual help; VERMEERSCH, What is Marriage? (a Catechism according to the Encyclical "Casti Connubii") n. 58-60 says that the community of life mentioned here is not something over and above the mutual gift of themselves which the spouses have made to each other with a view to the procreation and education of children "since it began and sprang from that mutual giving of self and at the same time is its crown and glory". Whether one accepts these interpretations fully or not, it is to be noted that in any case marriage (even in the narrow sense) includes *essentially* a certain community of life which comes under the term mutual help. And this passage of the Encyclical should not be interpreted in such a way as to exclude any of the essential ends from marriage *presse sumptum*. The question that remains to be settled is this: Just how *extensive* is that *communio vitae* which is *essential* to marriage considered in the narrow sense. From the Encyclical we can conclude that it at least does not include the "interior conformatio supernaturalis" of the partners—for that is the primary cause and reason of marriage taken in a broad sense. And since this question about the extent of the concept "mutual help" in the essence of marriage is not clear, we did not attempt to define it with precision (above Chap. I and II). But we cannot agree with VERMEERSCH Theol. Mor. IV, n. 42 that the definition of marriage as "viri et mulieris coniunctio individuam vitae consuetudinem continens" is merely a definition of marriage *amplius acceptum*. For centuries of tradition have consecrated this as the definition of marriage strictly so called; and we think we have proved sufficiently that this "individua vitae consuetudo" is *essential* to marriage.

[68]I Cor. VII, 3.

CONCLUSION OF THE FIRST PART

The conclusion of this first part of our investigation is simply the definition of marriage. Gathering up the elements we have discussed (and which are to be understood in accordance with all that has been said) we define the essence of marriage as a *moral bond between man and woman which consists in the perpetual, exclusive right to one another's persons with a view to the acts of conjugal life and love.*

PART II.

THE CONDITION OF PRESERVING VIRGINITY

CHAPTER VI

DEFINITION OF TERMS AND *STATUS QUESTIONIS*

It is not within the scope of the present atudy to treat of the history of the doctrine of conditional matrimonial consent in general. Nor do we even intend to treat historically the particular condition under consideration. Our problem is rather one of perennial philosophy and the present law of the Church. We deal with it from the viewpoint of the Canon Law as it exists today in its developed form.

For the doctrine of conditional marriage consent did not always exist in the Church in the same fully developed form in which we now have it[1]. Our present formulation emerged as the result of long debates and uncertainties and cannot be *fully* understood except in the light of that historical development. And in fact one gets the impression that the doctrine of conditional matrimonial consent has not yet reached the term of its development in Church Law. The many debates about what conditions do and do not invalidate raise the suspicion that the philosophy of this part of the law has not so far perhaps been adequately stated. (It is true however, that many of these debates can be reduced to the prior question: What is the essence of marriage?) But for the purposes of the present essay it will suffice to state the doctrine of the Code and then comment upon it;—but only on those points which have a direct bearing on the question at issue.

The Code, taking for granted the possibility of valid conditional consent, presents the doctrine as follows[2]: "Conditio semel apposita et non revocata: 1o, Si sit de futuro necessaria vel impossibilis vel turpis, sed non contra matrimonii substantiam, pro non adjecta habeatur; 2o, Si de futuro contra matrimonii substantiam, illud reddit invalidum; 3o, Si de futuro licita, valorem matrimonli suspendit; 4o, Si de praeterito vel de praesenti, matrimonium erit validum vel non, prout id quod conditioni subest, existit vel non".

A condition is a circumatance to which a juridical act (e.g. promise, contract,) is attached in such a way that according to the intention of the agent the validity of the act depends upon the existence of the circumstance[3]. Conditions are indicated in English by the words "if", "on con-

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[1]For ths history of the doctrine of conditional consent cf. TIMLIN pp. 3 to 69; WERNZ-VIDAL V, n. 512.

[2]Can. 1092.

[3]For the definition of a condition cf. WERNZ-VIDAL V, n. 510; PAYEN II, n. 1725; GASPARRI De Matr. (1932) n. 79; REIFFENSTUEL lib 4 tit. 5 paragr. 1 n. 3; SCHMALZGR. lib. 4 tit. 5 paragr. 1 n. 1.

dition", "as long as", "provided", and other equivalent expressions. For instance: I hereby agree to sell you my business for such a price provided that you learn accounting. Here the validity of the agreement depends on the fulfillment (existence) of the circumstance: learning accounting. The intention of the agent is capable of thus making his act exist or not according to the existence of the circumstance, because the act in question is a *juridical* one, that is, one which pertains to the juridical, or moral, or intentional order. Since such entities depend for their very being on the intention of the agent, the agent can intend their existence as he pleases. If he wishes to intend them conditionally, they do not exist until the condition is verified.

If the conditioning circumstance is future, the condition is called future, if present, the condition is called present, if past, the condition is called past. The example given above is a future condition. The following is an example of a present condition: "I sell you this for five dollars provided you are 21 years old". And a past condition: "I appoint you postmaster provided you have passed your civil service examinations[4]".

The existence of the conditional act or contract can depend on the existence of the conditioning circumstance in various ways. When the existence of the act is *suspended* until the circumstance is verified, the condition is called a *suspensory* condition; e.g. "I sell you this field for a thousand dollars on condition that the crops fail this year". Suspensory conditions are always future. The act does not *begin* to exist (or at least enjoys only a "suspended" existence) until the condition is verified[5].

When the *continued* existence of an act (contract etc.) depends on the existence of some future circumstance, the condition is called resolutory; e.g. "I contract to till your field for five dollars a day, on condition that my health continues." Resolutory conditions are likewise always future. But they do not keep the act from beginning to exist until the condition is verified; they *rescind* it and destroy it when they are verified[6].

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[4]English and American Law speaks of conditions precedent, concurrent and subsequent, but these divisions do not coincide with our past, present and future. Cf. CLARK, Contracts, p. 575 and below notes 5, 6 and 18.

[5]WERNZ-VIDAL V, n. 510; n. 512 note 3; KNECHT p. 587 note 1; VERMEERSCH-CREUSEN II (3rd Edit.) n. 381, 3. In American law suspensory conditions are grouped under "conditions precedent". Cf. CLARK, Contracts, p. 575: "In the case of a condition precedent the promisee's rights do not arise until something has been done or has happened or some period of time has elapsed".

[6]Compare "conditions subsequent" in American law; CLARK, Contracts p. 534 sq. and p. 575: "In the case of a condition subsequent, the rights of the promisee are determinable upon a specified event. The condition does not affect their commencement, but its occurrence brings them to a conclusion".

Finally, when the existence of the act is made to depend on a present or past circumstance it is clear that the validity of the act is not suspended, nor made rescindible. It is valid then and there according as the circumstance is existent or not. "And these conditions, since they do not suspend the validity of the act, are not conditions strictly and properly so called. . . . . ; but *improperly*, by reason of the *ignorance* or *doubt* whether they have been *objectively* verified they can be numbered among suspensory and resolutory conditions. For although the *existence* or *validity* of the act is not suspended, nevertheless in the meantime one has not *certain knowledge* of the validity of the act"[7].

A condition is called licit or illicit according as it is conformable to the divine and human law or not[8]. For instance: "I agree to give you work on condition that you steal for me", etc.

The "necessary" and "impossible" conditions mentioned in the canon quoted above, are not pertinent to our problem[9].

A condition is said to be contrary to the substance of an act if the circumstance on which the act is made to depend excludes the possibility of the act. In other words a condition against the substance involves a contradiction. For instance: "I marry you on condition that the marriage be dissoluble at will". Since indissolubility is an essential element in marriage there can be no marriage without it. Hence to marry with such a condition is equivalently to say: "I marry you on condition that our marriage shall not be a real marriage";—which, of course, is a contradiction. Hence an act posited with a condition against its substance is not really posited at all. It only appears to be posited. In reality it neither exists, nor can exist dependent on such a condition. But since the parties through ignorance or wilfulness *intend*, or *try* to intend, that the act shall exist, and since the invalid act thus attempted *seems* to exist, this condition too can be said to fulfill the general definition of condition given above; i.e. a circumstance to which a juridical act is attached in such a way that according to the *intention* of the agent the validity of the act depends upon the existence of the circumstance[10].

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[7] WERNZ-VIDAL V, n. 511 note 3 who refers to paragr. 6 Instit. de obl. verbor. III, 15.

[8] Jurists use the terms *honesta* and *turpis* in Latin. The Code (can. 1092) speaks of a condition *licita* and *turpis*. American Law speaks of *illegal* agreements. Cf. CLARK, Contracts p. 314 sq.

[9] Cf. WERNZ-VIDAL V, n. 511 for definitions of a condition: possibilis, impossibilis, necessaria, contingens, potestativa, casualis, mixta, affirmans, negans, expressa, tacita.

[10] TIMLIN p. 236 seems to think an "invalidating condition" to be a contradiction in terms,—since a condition presupposes a valid juridical act which it modifies. But this seems unnecessarily captious. It suffices, as far as the general definition of a condition is concerned, that the act which is attached to it have the semblance of validity. The

It is evident then, from the very definition of a condition against the substance of a given act that it invalidates that act. But it is one thing to say: all conditions against the substance invalidate; and another to say: all invalidating conditions are conditions against the substance. This latter is not quite true. A condition against the substance of marriage is one which excludes some essential note in the *object* of consent, that is, some essential *constituent* of marriage. But consent can also be looked at subjectively. That is, consent may be deficient because of the incapacity of the parties to give a valid consent. This incapacity may arise either from natural or positive law and may be either an impediment strictly so called (as the Code enumerates them in the present law), or it may be an impediment in a broader sense, like grave fear etc. Such incapacity for marriage is a defect in the *subject* consenting rather than a contradiction in the object of consent. Accordingly it is not impossible to imagine a condition which would have reference to the subjective incapacity of the parties and be invalidating on that score. For instance: I marry you on condition that you are my father. Such a condition is invalidating (even from natural law), but it is not against the substance. It invalidates because it makes the marriage depend on the diriment incapacity to marry. Invalidating conditions then, can be of two classes: First, those that try to make the marriage depend on an essential deficiency in the object of consent, and these are properly called conditions against the substance; and secondly, those that try to make the marriage depend on an essential deficiency in the subject consenting. These two classes exhaust all the possibilities of invalidating conditions, for if consent is neither objectively nor subjectively deficient, the marriage cannot be invalid.

The canon quoted above mentions future conditions against the substance as invalidating but says nothing of past or present conditions against the substance. Do these invalidate too? The authors are divided—at least verbally. The older opinion seems to be that past or present conditions against the substance do not invalidate. The example is given: "I contract marriage with you if you have made yourself sterile". (The supposition is that this condition would be invalidating if it were future, e.g. "if you will make yourself sterile"). But since in a past condition of this kind there is question of a *fait accompli* which *de facto* is not incompossible with this present marriage, and since there is not imposed any obligation against the essence of the marriage, the marriage stands. If the present or past condition therefore does not touch the future at all,

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phrase "invalidating condition" is no more contradictory (in fact much less) than the phrase "invalidated act", for the latter is truly a juridical act which is not a juridical act, but only seems to be. Hence the distinction of some civil jurists between the *mere existence* and the *valid existence* of juridical acts (VERMEERSCH, Quaestiones De Justitia n. 325). The phrase "invalidating condition" is intelligible, sanctioned by usage and philosophically defensible.

not even in the form of an obligation *de futuro*, it does not invalidate according to this opinion[11].

The other opinion holds that any condition against the substance invalidates whether future, present, or past[12]. For, they argue, a condition against the substance of a given marriage, by its very definition excludes the marriage. Hence if the parties seriously attach their consent to it, the marriage cannot be valid. And with regard to canon 1092, which mentions only future conditions against the substance, some say that part 4o of that canon is general enough to include *all* past and present conditions, even those which are against the substance[13].

To us this dispute seems to be more about words than anything else and that it disappears if the following three points are kept in mind:—

1) As stated above, one can conceive an invalidating condition which is not strictly *against the substance*, but regards rather a deficiency in the subject consenting. The more or less fantastic example given there: "I marry you on condition that you are my father", illustrates the point. Such a condition is *present* and yet certainly invalidates according to natural law. An example of a past invalidating condition (from positive law) might be: "I marry you, my adulterous lover, on condition that you have killed your wife"[14]. Therefore past and present invalidating condi-

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[11]Thus for example: SANCHEZ lib. 5 disp. 9 n. 6 and 7; PIRHING, lib. 4 tit. 5 paragr. 3 n. 14; SCHMALZGR. lib. 4 tit. 5 paragr. 5 n. 115 sq. and n. 134; REIFFENSTUEL lib. 4 tit. 5 n. 40 (ut videtur); WERNZ-VIDAL V, n. 518 note 31; CAPPELLO De Matr. n. 642, 4; CHELODI n. 127 with note 3.

[12]Thus: DE SMET n. 155; AICHNER paragr. 169, n. 2; SCHULTE Handbuch des Katholischen Eherechts, I Teil, paragr. 21 note 22 (p. 147); KNECHT p. 590 note 1.

[13]DE SMET n. 155. This interpretation of can. 1092 § 4 is far-fetched. Take for example this condition: "I marry you on condition that you are impotent". DE SMET would admit this to be a condition against the substance *de praesenti*. But applying can. 1092 § 4 to it we would have to say that if the condition is "de praeterito vel de praesenti matrimonium erit validum vel non prout id quod conditioni subest, existit vel non". In other words if the partner really were impotent, the marriage would be valid.

[14]Cf. can. 1075, 2o for impediment of crime. No matter how fantastic some of the examples we have been using for purposes of illustration may seem to be, they can hardly surpass in strangeness some of the cases that have actually occurred in the course of history. Joyce, p. 70 gives a remarkable example afforded by a constitution of Archbishop Winchelsey issued at a synod held at Winchester in 1308. "He decrees that should a man and woman have already been convicted twice for immoral relations, they should in case of a third relapse be compelled to sign a document declaring themselves to be man and wife if any further fall should occur. The contract ran as follows: 'Ego ex nunc accipio te in meam si de cetero carnaliter te cognoscam. . . . . etc.'"

tions which are not strictly against the substance are at least conceivable;—but the parties to the dispute have not such conditions in mind.

2) When we speak of a condition against the substance as invalidating we mean: a) against the substance of this marriage considered *in individuo*, not against the substance of marriage in general or against the substance of some other marriage. Hence some of the examples given are not to the point. For instance: "I, Titius, marry you, Bertha, on condition that you make Sempronia sterile". Such a condition may or may not be against the substance of marriage in general, or against the substance of Sempronia's marriage, but it is certainly not against the substance of the marriage in question, that of Titius and Bertha[15]. b) We mean: a condition against the substance of this marriage considered *in facto esse*. In other words, the substance of marriage in question is simply the object of consent. This object of consent is the marriage bond, which is made up of rights and obligations. A condition against the substance of this bond, therefore, will always be an attempt to assume some right or obligation contrary to one of the substantial rights or obligations of the bond. It will try to take away some obligation essential to the bond, or add some obligation which destroys an essential right. Such a condition in the consent *must necessarily regard the future* because the marriage bond with which it is concerned *is future with regard to the consent*. The bond is an effect of the consent. Marriage *in facto esse*, (the object of consent), is future therefore with regard to marriage *in fieri*, (the consent). Therefore we conclude that a condition which is strictly against the substance of this individual marriage must have at least some reference to the future and must be in some sense a future condition. If one examines the usual examples given of conditions against the substance one will see that this is so[16].

3) But this is not the same thing as saying that conditions against the substance are necessarily future in the same strict sense that suspensory and resolutory conditions are future. Let us take an example admitted by all to be against the substance: "I marry you on condition that you support me by prostituting yourself." Such a condition need not be suspensory or resolutory but may simply mean: "I marry you here and now, if you assume the obligation here and now to support me by prostitution". When such an agreement to a condition is not merely an agreement to abuse the marriage right after it has been validly acquired, but is an attempt to do away with the exclusivity of the conjugal right itself, it is

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[15]On this point cf. SANCHEZ lib. 5 disp. 9 n. 5.

[16]For instance: GREGORY IX (c. 7 X 4, 5) "contraho tecum si generationem prolis evites vel donec inveniam aliam honore vel facultatibus digniorem aut si pro quaestu adulterandam te tradas". According to TIMLIN p. 335 sq.; SCUMALZGR, lib. 4 tit. 5 paragr. 5 n. 115, 116; BALLERINI-PALMIERI VI, n. 279 there are no real conditions against the substance which are not somehow future,—and they give a reason similar to the one assigned in the text.

admitted by all to be against the substance and invalidating[17]. Yet the circumstance on which the validity of the marriage is made to depend is a *present* circumstance; it is the *present assumption of an obligation* contrary to the substance. And it might be the *past* assumption of the same obligation, e.g. "I marry you if you *have* bound yourself to a life of prostitution", etc. Therefore the condition could with justice be called a present or past condition. But since the obligation thus assumed regards the future, it can also be called a future condition in a broad sense. In English and American law such dispositions might be grouped under conditions *concurrent*, in contradistinction to conditions precedent (suspensory), and conditions subsequent (resolutory). CLARK says[18]: "In the case of a condition concurrent, the promisee's rights are dependent on his doing or *being ready to do* something simultaneously with the performance by the promisor". The phrase "being ready to do" is explained in such a way that it means the present assumption of an obligation to be executed in the future.

It seems to us that the proponents of both opinions cited above, would agree with the main contentions of these three points and that they agree on the whole as to which conditions do and which do not invalidate as being contrary to the substance. But they would divide on the question whether this last type of condition can be properly called future or not. We think that it can, as long as one understands that it is not future in the same strict sense as the future suspensory and future resolutory; but to distinguish it from these, we call it, for lack of a better name: *a concurrent condition*. It has been necessary to treat this topic because the condition of preserving virginity is a condition of this type. (It goes without saying that not all concurrent conditions in marriage are against the substance. Whether one is so or not depends on the nature of the obligation assumed).

Conditions must be carefully distinguished from other somewhat similar modifications of juridical acts, especially from *modes*.

A mode is a disposition which, supposing the validity of a juridical act (especially a contract) is attached to the same in such a way as to induce an additional or collateral obligation[19]. In English and American

[17]Cf. WERNZ-VIDAL V, n. 518 note 36 for distinction between intention not to contract obligation and intention not to fulfill obligation in marriage. Compare also Rota IV, 50 (Coram LEGA 17 Jan. 1912 n. 26); XVIII, p. 354 n. 3 (Coram GUGLIELMI, Aug. 17, 1926).

[18]CLARK, Contracts p. 575.

[19]WERNZ-VIDAL V, n. 510 note 2 defines it: "Modus, qui insinuatur particula 'ut' est onus actui legitimo adiectum, ad quod una pars alteram obligat ex justitia post perfectum actum legitimum". This definition is used in S. R. Rota Decis. VI, p. 327 (Coram HEINER, Nov. 28 1914), and is the one common among canonists. Ours does not differ from it. Cf. also SCHMALZGR. lib. 4 tit. 5 paragr. 6 n. 139, 140; REIFFENSTUEL lib. 4 tit. 5 n. 2 and n. 61; BALLERINI-PALMIERI VI, n. 267: LAYMANN Theol. Mor. lib. 5 tr. 10 pars 2 c. 7 n. 10, 11, 12.

law some dispositions of this kind attached to contracts are called warranties[20]. Ballerini-Palmieri gives the example: "I marry you in order that you will take care of the children of my first marriage"[21]. A mode supposes the validity of the juridical act to which it is attached and is dependent on it; whereas in the case of the condition, the juridical act in question depends on the condition; it is valid or not according as the condition is verified. "The condition therefore and the mode differ in this, that the former for the most part suspends the validity of a disposition, while the latter neither suspends nor revokes a legitimate act but is added to it and supposes it already complete"[22]. Accordingly when contractual consent is conditional, the contract *depends* on the condition, in *conditioned* by it. But when the contract is modal, the mode depends on the validity of the contract. It is like a secondary subsidiary contract attached to the first, and must be thought of as *following* it. Actually of course a mode is drawn up and attached to a contract before the bargain is closed and thus forms one whole contract, but it follows on the contract juridically speaking. It is *natura posterius* to it.

Sometimes authors distinguish between a *pactum annexum* and a *pactum intrinsecum* attached to a contract, and it is not clear whether they mean thus to distinguish a mode from a condition, or to distinguish two different kinds of modes, one intrinsic and the other extrinsic to the contract[23]. This is a matter of terminology. We prefer to say that a condition is an intrinsic pact,—since it makes one whole with the original; and that a mode is also an intrinsic pact for the same reason,—it is an integrating part of the original bargain. For though it is *like* a secondary subsidiary contract added to the first, it is really an integrating part of the first. There is only one contract,—a modal one,—not two contracts. Finally a *pactum extrinsecum* would be a second contract added later to the first and subsidiary to it, but not a part of the original bargain[24].

It is disputed among the authors whether or not a mode contrary to

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[20]CLARK, Contracts p. 583 quotes the following definition of a warranty: "an express or implied statement of something which the party undertakes shall be a part of the contract; and though part of the contract yet collateral to the express object of it."

[21]BALLERINI-PALMIERI, VI, n. 267.

[22]WERNZ-VIDAL V, n. 510 note 2; LANCELOTTO tom. 2 tr. 9 paragh. 13 glossa k: "Modus actum non suspendit, secus conditio". The difference between a warranty and a condition precedent is explained similarly by CLARK, Contracts p. 582.

[23]Cf. for example BILLOT De Sacr. II, p. 341 and compare SANCHEZ lib. 5 disp. 19 n. 5; UBACH II, n. 2677 sq.

[24]KNECHT p. 591 note 1 speaks of making before, or along with, marriage "einen einfachen Vertrag" to preserve continence. This seems to be equivalently what we have called a strict mode, a pact intrinsic to the original consent.

the substance of marriage invalidates it. The older authors seem to have been of the opinion that a mode contrary to the substance invalidates just as a condition does[25]. For, they argue, a person does not seem to have the intention of contracting marriage if at the same time he has an intention contrary to its substance[26]. The other opinion says that since a mode from its very definition supposes a valid act on which it depends, it never invalidates,—not even if it is contrary to the substance[27]. The first opinion really regards the practical question: what did the parties intend? The second opinion is concerned with the more theoretical question of the nature of a mode and affirms: *If* it is a real mode, it never invalidates. WERNZ-VIDAL[28] sums up the dispute as follows: "A mode which is contrary to the substance of marriage seems to many writers to invalidate the marriage. And this opinion is to be readily followed *in practice* since an obligation attached to the marriage contract in the form of a mode, frequently, according to the actual intention of the contracting parties, can be nothing but a simulated condition *in pactum deducta*. But *theoretically* a *true mode*, being of its nature an obligation attached to an already perfected contract, does not invalidate the marriage contract even if it is contrary to the substance of marriage". And this seems to be the general view today[29].

Ordinarily, conditions and modes attached to contracts, in order to claim legal recognition, must be agreed to externally by the parties. They must be *deducta in pactum*. For the law cannot easily take cognizance of internal acts. It is difficult to prove their existence. And as far as human contracts are concerned it is essential to their existence that the consent which brings them into being be not only internal but also external[30]. Ordinarily therefore, when authors speak of conditions and modes in marriage consent, they mean *external agreements* between the contracting parties.

But there is nothing contradictory in the idea of a condition or mode

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[25]Thus: SANCHEZ lib. 5 disp. 19 n. 5 (citing for his opinion PALUDANUS, ANTONINUS, SYLVESTRINUS and others); PIRHING lib. 4 tit. 5 n. 30 assertio 3; LAYMANN lib. 5 tr. 10 pars 2 c. 7 n. 11; SPORER Theol. Mor. pars 4 c. 1 sect. 3 n. 544 (ut videtur).

[26]Cf. MAHONEY, article: Matrimonial Consent and "The Safe Period" in: The Clergy Review 13 (Apr. 1937) 121 for the relation between intention against the substance and condition against the substance. And cf. below p. 95.

[27]REIFFENSTUEL lib. 4 tit. 5 paragr. 2 n. 64; SCHMALZGR. lib. 4 tit. 5 paragr. 6 n. 143; GASPARRI n. 85; ROSSET I, n. 190.

[28]WERNZ-VIDAL V, n. 519 Schol. I.

[29]Cf. CAPPELLO III, De Matr. n. 644; GENICOT II, n. 459. In practice therefore one must apply the doctrine of *prevailing* intention. Cf. DE LUGO De Sacr. disp. 8 sect. 8.

[30]BRANCATUS disp. 17 art. 9 n. 168.

which is one-sided, or tacit, or merely internal[31]. And if one of the parties were to make a condition against the substance secretly and internally, it would invalidate marriage *in foro interno* just as surely as a conditional pact against the substance. And if it could be proved for the external forum the marriage would be invalid in that forum, too. This point which was not always clear[32], is agreed upon today[33]. But these internal intentions against the substance are frequently not thought of as conditions or modes of the contract, but are called simply *intentions* against the substance, or more technically: *simulation of consent*[34]. A Rota decision says[35]: "It can happen however that someone, while celebrating and accepting the rite of marriage externally, may nevertheless by an express and positive act of the will reject the contract or its essential obligations; then his consent is said to be *simulated* or *feigned;* if he rejects the contract itself it is said to be total simulation; if he accepts the contract, but rejects positively and expressly its substantial obligations, or merely one of them, it is said to be partial simulation". And (the decision continues) even partial simulation invalidates marriage, "since a contract can neither exist nor be conceived without its substantial obligations. Nor should one object. . . . . that he who wills the contract also wills its substantial obligations since the contract cannot be separated from its substantial obligations.

"This is true indeed when he does not think about these obligations, because then he wills them implicitly in the contract. But when he does think about these obligations and by a positive, express act rejects them, even one of them, he can certainly not be said to accept the obligations; wherefore, since the contract cannot be separated from its obligations, he who rejects them rejects the contract also and so the marriage is null. Or, in other words, he wills and does not will the contract; he wills it, because *ex hypothesi* he celebrates it; he does not will it, because he rejects

[31]Some authors seem to think of a merely internal condition from an entirely different point of view—as if it were ruled by different laws. Cf. TRIEBEL c. 6 paragr. 63 n. 519, 520 who insists on the distinction between "Bedingung" and "Vorbehalt".

[32]Cf. PIRHING lib. 4 tit. 5 paragr. 3 n. 14; VAN DE BURGT pars 2 paragr. 3 n. 73 for literature on both sides.

[33]A thorough examination of the present practice of the Rota in this regard will be found in an article: "Matrimonial Consent and The Safe Period" by E. J. MAHONEY in: The Clergy Review 13 (Apr. 1937) 121. There is a particularly good presentation of the *presumptions* on which the court proceeds in notes 11, 12, 13, 15, 22. Compare BRANCATUS, diap. 20 art. 1. n. 3; diap. 17 art. 9 n. 168; WERNZ-VIDAL V. *n.* 460 sq.; VAN DE BURGT pars 2 paragr. 3 n. 73; TIMLIN p. 319.

[34]Some authors speak of simulation as a "mental condition".

[35]S. R. Rotae Decis. III, p. 15 (Coram MANY Jan. 21, 1911); Cf. also S. R. Rotae Decis. XVIII, p. 332 n. 2 (Coram SOLIERI Aug. 12, 1926).

its substance; and these two contradictory acts cancel one another out and so the marriage is null. Or again, to use another and perhaps better formula: in this case there are two acts of the will, one general, namely to make the contract; the other more special, precise and determinate, namely to reject this or that obligation; now the later act certainly prevails over the prior, and cancels it, since it is more specific and 'species deroget generi' according to Regula 34 Juris in VIo, which holds in the whole law and notably in contracts. . . . ."

This doctrine has been incorporated into the Code, for canon 1086 § 2 reads: "At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum aut omne ius ad coniugalem actum, vel essentialem aliquam matrimonii proprietatem, invalide contrahit".

Now one may ask whether a merely internal condition or mode against the substance can be distinguished from this simulation of consent, or from a simple internal intention against the substance. Practically there is not much difference. But the following points may be noted. *Total* simulation of consent differs from an internal mode or condition against the substance inasmuch as these latter attempt at least to give a marriage consent, though an essentially deficient one; while in the case of total simulation the party does not intend to consent at all. *Partial* simulation of consent, seems to differ from a merely internal condition or mode against the substance only *formally;* that is, only in the *aspect* under which it affects consent. A condition is something on which consent *depends* according to the intention of the contracting party. A mode is something attached to a consent supposed as valid. But a partial simulation does not affect consent explicitly under these formalities; it merely accompanies the (attempted) consent prescinding from these legal considerations. Hence it is called also a simple *intention* against the substance. In practice it may be equivalently a condition or equivalently a mode. Individual cases must be judged in the light of concrete circumstances.

But it is important to remember that there is no adequate distinction between intentions against the substance and conditions or modes against the substance, as though these could be governed by entirely different sets of rules. A condition against the substance whether internal or external, whether reduced to a pact or not, is necessarily also an intention against the substance. The same thing is true of a mode against the substance; whether tacit or expressed, it necessarily implies in every case an intention against the substance. Hence in practice, the validity of the marriage will depend on which intention prevailed. In the case of the condition concurrent or condition future against the substance it is always evident from the very nature of a condition that the intention is to reject the marriage rather than reject the condition. In the case of the simple intention against the substance, or partial simulation, as long as it involves an express, positive act of the will, the Code presumes, as the above quoted decision presumed, and rightly, that the prevailing intention excludes real

marriage. Finally, in the case of a mode against the substance it must be confessed that in practice the theoretical difference between condition and mode evanesces. Persons who have a positive and express *intention* at the moment marriage is contracted of excluding some essential from the contract, do not in practice take into account the legal distinction between mode and condition. They do not say, for instance: "We intend to marry, and once validly married, intend that we shall have no obligation of fidelity to one another". Rather (as in the decision cited above) they have a general intention to marry, but another more particular and determinate additional intention which excludes an essential from the object of consent. Hence even if they do not formulate this intention as a condition of consent, they are nevertheless guilty, generally, of *partial simulation*—which invalidates.

On the whole therefore we agree with those authors who say that a mode against the substance invalidates; and we hold that in practice, the condition, the mode, the intention, against the substance, whether external or not, whether reduced to pact or not, invalidate consent.

The other modifiers of juridical acts from which conditions are to be distinguished, namely "causa"[36], "demonstratio"[37], "dies" or "tempus"[38], are of minor importance to the present study.

These definitions and distinctions have been necessary in order to formulate precisely the question of the thesis. Sometimes the problem is proposed by canonists thus: "Utrum conditio *honesta contra substantiam* invalidet"[39]. This is misleading and inaccurate. For it goes without saying that a condition which is really against the substance invalidates whether it is *honesta* or not; and in fact supposing it to be against the substance it could hardly be *honesta* at all. Hence the authors who propose the

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[36] "Causa tunc dicitur apponi contractui quando denotatur causa, ob quam quis contrahit. Explicari autem solet per particulam *quia* v. gr. 'contraho tecum quia nobilis es, primogenita, heres, etc.' " BALLERINI-PALMIERI VI, n. 267. CAUSA of itself *never* invalidates. See note 37 on *demonstratio* and cf; BALLERINI-PALMIERI VI, n. 302.

[37] "Demonstratio adjicitur quando exprimitur aliqua qualitas, per quam determinatur seu demonstratur persona cum qua contrahitur: v. gr. "duco te, quae libera es, quae es virgo, aut filia illius principis etc." BALLERINI-PALMIERI VI, n. 267. *Demonstratio* of itself *never* invalidates—but at times is equivalent to a condition or involves an *error personae* etc. Cf. BALLERINI-PALMIERI VI, n. 302.

[38] "Diei seu temporis adiectio fit, quando apponitur circumstantia diei seu temporis velut terminl, quo existente sponsalia seu matrimonium *pro contracto* quoad suos effectus habeatur, vel etiam quo advenlente contractus, v.g. sponsalium, cessare censeatur". BALLERINI-PALMIERI VI, n. 267. Generally *dies* or *tempus* are equivalent to suspensory or resolutory conditions and are to be judged accordingly. Cf. BALLERINI-PALMIERI VI, n. 305.

[39] Thus e.g. SANCHEZ lib. 5 disp. 10; SCHMALZGR. lib. 4 tit. 5 paragr. 5 n. 119.

question in this form are either prejudging the issue, or are guilty of using words very inaccurately[40]. We prefer therefore to state the question in the form given at the beginning of the present essay: "Is marriage contracted with a condition to preserve virginity forever a true marriage?"— or: "Does a condition of perpetual continence invalidate marriage?"

With regard to the question thus formulated there are a few observations to be made.

This condition must not be understood as a future suspensory nor as a future resolutory condition. For if it were such, it would certainly invalidate. If the condition meant to suspend the validity of the marriage until the condition were verified, the marriage could never be valid— for the condition could not be verified until death. And if the condition meant to rescind the marriage in the event that the agreement to preserve continence were broken, it would be a condition against the indissolubility and hence would certainly invalidate[41]. We understand the condition rather as a concurrent condition; that is, one in which the conditioning circumstance is the present assumption of an obligation which is to be executed in the future. The partners say to one another equivalently: "I marry you now on condition that you now assume the obligation to preserve chastity"[42].

Whether such a disposition attached to the marriage deserves to be called a condition in the strict sense of the word is mostly a matter of taste. It is not a condition in the same strict sense as the suspensory and resolutory conditions. But it is as much and more a condition than the conditions *de praesenti* and *de praeterito* of which the Code speaks. In a word it fulfills the general definition of a condition enunciated at the beginning of the present chapter.

ZALLINGER notes that a great deal of misunderstanding has been engendered in the discussion of the conditional consent in general, by a confused use of the word condition[43]. This is especially true in the case of the condition we are discussing. One must take care, therefore, in interpreting what the authors mean when they call the condition of preserving virginity at times a *strict* condition, and at other times a condition *im-*

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[40]BALLERINI-PALMIERI VI, n. 231 nota a, calls attention to this inaccuracy of language.

[41]KNECHT p. 592 note. It is strange to find so careful a writer argue against the condition as if it were suspensory or resolutory. In all the literature we have found no one who defended the validity of the marriage in such a supposition.

[42]WERNZ-VIDAL V, n. 521 note 46: "Liquet ex praecedentibus conditionem appositam non esse intelligendam de conditione *de futuro* sive *resolutorio*, sed unice *de conditione de praesenti* qua de praesenti suscipitur obligatio cujus executio pertinet ad tempus futurum". TIMLIN p. 329 says that the condition should mean: "I marry you on condition that you now promise" etc. Cf. PICHLER lib. 4 tit. 1 n. 80 ad 3.

[43]ZALLINGER lib. 4 tit. 5 n. 81.

properly so *called*. For (if one may be allowed to be meticulous in these distinctions) a condition in the very strictest sense of the word is only the future suspensory (condition precedent). Then comes the future resolutory (condition subsequent), which is also called a condition in a strict sense. All the other conditions, concurrent, *de praesenti* and *de praeterito*, are conditions improperly so called if compared with these future conditions. But they are called "strict" conditions at times by comparison with *modes* and other contractual modifiers. Hence authors say that the condition of preserving virginity can be either a *strict* condition or a mere *mode* of the consent. It is plain that this is another use of the word "strict". And so when authors call our condition a *conditio improprie dicta* they mean that it is not a future suspensory or future resolutory. And when they call it a *conditio stricte dicta* they mean it is not a mere mode.

It is possible of course to attach the agreement of preserving chastity to the marriage contract either as a mode or as a condition. It is not true to say that the agreement can only be understood as a mode. UBACH, for instance says,[44] that the problem does not concern a future resolutory, nor a future suspensory condition, nor even an agreement "ad modum condicionis rei licitae honestae de praesenti"; and gives the reason for this last: "for thus the validity of the contract would have to be decided according as the true purpose not to consummate existed here and now or not". As we have seen this is exactly how the problem should be considered,—the validity of the consent depends on the present assumption of the future obligation. UBACH then calls the agreement a *pactum adiectum;* and yet seems to distinguish it from a mere *modus adiectus*—as if it were half-way between a condition and a mode. This way of considering the matter seems to echo an opinion of PICHLER who speaks as follows about the agreement to preserve chastity[45]: "It is rather a mode than a condition. . . . . In fact in such a marriage there is found both a condition and a mode; a condition in the beginning of the contract, inasmuch as neither party wishes to obligate himself to the other except under the condition of preserving chastity; and a mode after the contract is already complete inasmuch as each part is held to the attached obligation of preserving chastity". WERNZ criticizes this opinion very justly as follows[46]: "This last remark of the famous canonist concerning a condition and a mode in the same marriage contract, seems to be more subtle than true. For a condition and a mode are two entirely different things, since consent is dependent on a previous condition, whereas a mode follows upon a contract already complete. Now if the condition was validly attached to the contract from the beginning, the addition of the mode is entirely super-

[44] UBACH II, n. 2681.

[45] PICHLER lib. 4 tit. 1 n. 80 ad 3; HUTH tit. 1 sect. 2 paragr. 1 (p. 109).

[46] WERNZ-VIDAL V, n. 521 note 46. Compare GASPARRI II, n. 900; KRIMER IV n. 818.

fluous, unless one wishes to confuse the *obligation* assumed in the condition with the *execution* of the obligation".

Our problem then is whether the *condition* invalidates; we are not concerned with the other question whether a modal agreement to preserve chastity would destroy consent[47].

Another remark: the conditional agreement to preserve chastity may be intended to bind merely from fidelity, or to be revocable at the will of either party, or it may be a etrictly contractual agreement, binding in justice and not revocable except by *mutual* consent. We understand it in thia latter sense[48].

Understanding the problem then according to all the above limitations we wish to prove that such a condition whether tacit or expreased, whether one-sided or mutual, whether *deducta in pactum* or not, and even if intended to bind in etrict justice, is not incompatible with marriage and does not of itself invalidate matrimonial consent[49].

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[47]If the condition does not invalidate then *a fortiori* the mode does not. Many authors who hold that the condition invalidates would admit that a modal agreement to the same effect would not,; for instance: WERNZ IV, n. 302 note 41; KNECHT p. 591 note; LINNEBORN paragr. 41 n. IV (at least theoretically); DE SMET n. 156; LANCELOTTO tom. 2 tr. 9 paragr. 13 glossa k; CHELODI n. 125; BILLOT De Sacr. II, p. 341. HUARTE n. 164 and TIMLIN p. 320 hold that it is certain that the modal agreement does not invalidate. But COVARRUVIAS tom. 1 De Matr. pare 2 c. 3 paragr. 1 n. 10 says that both mode and condition invalidate.

[48]The condition of which we speak is sometimes called a *strict* condition for this latter reason also—because it binds from strict justice like other contractual conditions. The following authors say explicitly that they defend the validity of the marriage even in the supposition that the condition binds in strict justice: HUARTE n. 171; CONINCK disp. 22 dub. 6 n. 39; DE DICASTILLO disp. 5 dubit. 12 n. 156 and 162; HIQUAEUS In IV Sent. lib. 4 dist. 31 q. unic. n. 58; KRIMER IV, n. 806, 807, 808 (where he answers objections against his doctrine); LIBERIUS De Matr. disp. 6 controv. 10 n. 173; MARTIN PEREZ disp. 13 sect. 6 n. 7, 10 and 14 (PEREZ eeems to contradict himself in nn. 7 and 10; but he holds very explicitly and goes to the trouble of proving that the condition does not invalidate even when it binds *ex justitia)*; SUAREZ De Incarn. pars II, disp. 7 sect. 1 post mediam; WERNZ-VIDAL V, n. 521 note 46 ad fin. Many other authors who defend the condition, although they do not say explicitly whether they understand it as binding from strict justice, nevertheless *imply* this, e.g. REBELLUS, pars 2 lib. 2 q. 13 sect. 5 n. 51; MASTRIUS Mor. Theol. disp. 20 De Matr. q. 2 art. 1 ad fin.; q. 3 art. 3 n. 109; q. 5 art. 1 n. 162. And although VASQUEZ disp. 125 c. 7 n. 83 seems to deny the validity of the marriage if the condition binds from strict justice, yet he explains this "strict justice" in auch a way that his mind on the matter is not clear.

[49]If an expressed mutual agreement in the form of a pact binding from justice does not invalidate, then of course, *a fortiori*, a merely internal or one-sided condition would not invalidate. For the question of an *intention* to preserve continence see below Chap. IX.

CHAPTER VII

THE ARGUMENT FROM THE NATURE OF THE MARRIAGE

In solving the problem of the thesis we can find little help in the positive pronouncements of the Church. There do not exist any official replies, which are decisive on the point. Frequently authors appeal to the chapter "De conditionibus appositis" of GREGORY IX,[1] but as we shall see below, not even a probable argument on either side can be deduced from that chapter. There are also certain cases decided by Rome in which some sort of agreement to preserve chastity was involved, but we have been unable to find any which was decisive for our own problem[2].

The question cannot be decided, either, merely by an appeal to the authority of theologians and canonists; for these authorities are hopelessly

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[1] C. 7 X 4, 5.

[2] Cf. for example S. C. Conc. In Ulixibonen. 8 Jul. 1724 and 18 Jul. 1724 (GASPARRI, Fontes V, n. 3201 and 3278.) Thia famous case was discussed by PITONIUS, Disceptationes, pars 3 discept. 58 n. 35 sq; and by LAMBERTINI (BENEDICT XIV) De Syn. Dioc. XXIII, 22. A marriage which was contracted on condition that the girl would enter religion was declared invalid. But nothing can be deduced from it for it is quite clear from the evidence that *all* marital rights were excluded in the pre-marital agreement, and besides the condition was resolutory. Cf. TIMLIN p. 323; CAPPELLO De Matr. n. 633; LEITNER p. 135 etc. S. C. Conc. Causa Varsavien. 24 Febr. 1894 ASS XXVII, p. 18 granted a diapensation *super rato et non consummato*, seemingly supposing the validity of the marriage, in a case where there seemed to have been a condition of preserving virginity. But the case is not conclusive; cf. TIMLIN p. 327. S. C. Conc. 27 Jul. 1907 ASS XL, p. 494 to a query on the validity of marriage entered with a written agreement not to make use of the marriage right did not reply directly but granted a dispensation *super rato et non consummato;* CAPPELLO, De Matr. n. 631; TIMLIN p. 316. S. R. Rotae Decis. XI, p. 146 (Coram SINCERO 31 Oct. 1919) declared invalid a marriage entered into with a condition *contra bonum prolis;* but SINCERO gives the reason: "Indubie constat Joannem Meron suo proposito prolis vitandae positivo actu voluntatis exclusiase *omne* jus ad conjugalem actum". Another decision contains statements which seem to favor our doctrine, i.e. S. R. Rota, Coram GUGLIELMI Jan. 20, 1933 (not yet published but quoted by Mahoney: "Matrimonial Consent and 'The Safe Period'" in: The Clergy Review 13 (Apr. 1937) 121 sq. note 10): "Et praefata distinctio iuris inter et usus exclusionem profecto attendenda est etiam quoad conditionem vitandi generationem prolis sive haec conditio posita fuerit in sensu turpi e.g. si generationem prolis evites per crimina onanistica, sive in sensu honesto, scil. per non usum matrimonii servando castitatem". For further Roman decisions in cases of conditions *contra substantiam* cf. KNECHT p. 593 note; LINNEBORN p. 333 note 3; MAHONEY loc. cit.

divided. Since the argument from authority is lacking, it is useless to insert here a list of the authors and their opinions. But since the matter is not without interest, we will add an appendix in which the reader may find the opinion of those authors we have been able to consult[3]. As far as numbers go, the majority of the authors consulted hold that the condition does not invalidate; and in our opinion these defenders of the condition are men whose names carry greater weight generally in theology than their opponents. But numbers prove nothing and authority is only as good as its arguments. We will resort to reason, therefore, to prove our point.

We have remarked earlier in this essay that if it were possible to define exactly what was meant by the substance of marriage and exactly what was meant by the condition to preserve virginity, a mere comparison of the two would reveal whether or not the condition was contrary to the substance; whether or not a contradiction was involved. And up to this point the object of our labor has been merely this;—to make as clear as possible at least what we conceive the substance of marriage to be, and what we mean by the condition. We are not under the misapprehension that in the first part of this essay the last word has been said on the essence of marriage. There are many problems in that connection which clearly or less clearly stand calling for an answer. But having given a view of the essence of marriage which we consider to be consistent with itself and consistent with the Catholic theology and Catholic law of marriage, we have no hesitation in using that doctrine now as a sufficiently solid foundation on which to base our case.

As a conclusion of the investigations of the first part of the essay we defined the essence of marriage as: "a moral bond between man and woman which consists in the perpetual exclusive right to one another's persons with a view to the acts of conjugal life and love". And the right in question is a *radical* right to those acts as distinguished from the proximate right. This is the substance of marriage. Now the condition of preserving virginity as we have explained it, and as it is posited by persons who really desire to enter upon the state of matrimony, contradicts nothing in this substance. It aims to take away the proximate right to the marriage act it is true, but this is not part of the substance of marriage. It aims to eliminate this proximate right in such a way that a partner would violate justice if he were to go back on his agreement. But we have seen that the proximate right to perform the marriage act may be so impeded that it cannot be exercised without injustice,—and yet the substance of marriage remains intact. We conclude therefore from a simple

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[3]See below p. 135. We cannot expect to find much direct enlightenment in a problem of this kind from the Fathers either. For as BIDAGOR says (in Miscellanea Isidoriana p. 254): "Como en la mayor parte de los escritores de la antigüedad, ni el pensamiento, ni las expresiones de los Santos Padres en materia matrimonial tienen alcance jurídico".

comparison of the condition with the essence of marriage that there is no contradiction involved in willing a marriage with such a condition; that the condition therefore is not *contra substantiam*, and that the marriage is not necessarily invalidated by it[4].

We say it is not *necessarily* invalidated because of course the contracting parties might make the agreement in such a way that the marriage would be invalid. They might wish to exclude "omne ius ad coniugalem actum", even the radical right, and then the marriage would be certainly invalid[5]. But we are talking only of a case in which the partners really desire to contract a valid marriage and wish to renounce only the proximate right to use it.

CHELONI objects that in order for people to marry with an agreement to grant the radical right and exclude only the proximate right they would have to be aware of these subtleties of the canonists. In other words, if ordinary people make an agreement to exclude the right to use marriage one must necessarily interpret this as excluding the whole right, since they know nothing of the distinction between radical and proximate. Hence in practice such marriages would generally be invalid even though theoretically the distinction were tenable[6].

From this objection one would be led to believe that ordinary people when getting married know very well that its essence is a *jus in corpus* but have not been instructed on the further point that this *jus* can be distinguished into proximate and radical. The fact is that not one in a thousand has ever heard of any right to the person at all, whether proximate or radical; nor have they ever even considered marriage in terms of commutative justice. What they must know about marriage in order to consent to it is set forth in canon 1082 § 1; "Ut matrimonialis consensus haberi possit necesse est ut contrahentes saltem non ignorent matrimonium esse societatem permanentem inter virum et mulierem ad filios procreandos". They need not know and generally do not know that the essence of marriage is a right to the person.

Hence when the priest asks their consent he merely asks them if they wish to marry. They say "yes", and that is the end of it. And just as they need know nothing of a right in commutative justice in order to marry validly, so they need know nothing of the canonical distinction be-

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[4]Cf. KRIMER IV, n. 798 and n. 816; BRANCATUS, disp. 17 art. 9 n. 165; HUARTE n. 166. Note that there can be no question of the condition invalidating except as being *contra substantiam*. It cannot be considered a condition which invalidates because it supposes a deficiency in the consent looked at subjectively. It has never been objected against the condition that it rendered the contracting parties "*inhabiles* ad matrimonialem consensum"—this is too evident to require proof. The only objection against it has been that it seems contrary to an essential part of the *object* of consent.

[5]Can. 1086 § 2.

[6]CHELODI n. 125.

tween proximate and radical right in order to marry validly with the agreement to preserve chastity. It is enough that they really desire to enter a valid marriage, having the minimum knowledge of what that means, and at the same time agree to oblige themselves not to use marriage. If this agreement is not objectively against the substance of marrioge, then their marriage is valid whether they know anything of canonical subtleties or not.

One should not conclude either, from the fact that only the radical right is essential to marriage that people ordinarily when giving their consent, consent only to this and nothing more. It goes without saying that *per se* and in the absence of an agreement to the contrary, the partners not only do give but are obliged to give their consent to the proximate right[7]. In the ordinary marriage therefore the normal consequence of consent is not merely the rodical right to intercourse, but also the proximate unimpeded right. But this is not the same thing as saying that the unimpeded right is an *essential* consequence. If they do make an agreement which impedes the use of the right, the essence of marriage is still there.

But against our conclusion, that there is no contradiction between the substance of marriage and the obligation to preserve virginity, some more fundamental objections are urged.

The first is that taken from the chapter "De conditionibus appositis" of GREGORY IX, which reads as follows[8]: "Si conditiones contra substantiam coniugii inserantur, puta si alter dicat alteri; contraho tecum, si generationem prolis evites, vel donec inveniam aliam honore vel facultatibus digniorem, aut si pro quaestu adulterandam te tradas, matrimonialis contractus quantumcumque sit favorabilis, caret effectu". But the condition of preserving virginity is equivalent to: "si generationem prolis evites"; therefore it is against the substance and makes the marriage invalid.

In the past this was a common form of argument against the condition[9], but it is not frequently resorted to today[10]. And in fact it has been

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[7]Hence a condition to preserve virginity made by one party without the knowledge or consent of the other is a *conditio turpis*. It would not necessarily invalidate the marriage, but any imaginary "obligation" resulting from it would have to be abandoned by the partner who mode it. Cf. below Chap IX note 46 for the question of the *licitness* of marriage with a condition to preserve virginity.

[8]C. 7 X 4, 5.

[9]Thus for example BARBOSA, tom. 2 lib. 4 tit. 5 n. 3;—and in general those commentators on the Decretals who oppose the condition.

[10]LEITNER p. 135 says that the decision of S. C. Conc. in Ulixibonen. (see above note 2) shows that the chapter "De cond. apposit." includes also *licit* conditions. CHELODI, too, n. 125, seems to speak in this sense but he is supposing the condition called licit to be against the substance.

answered so completely by jurists and theologians, ancient and modern, that its interest is principally historical[11]. For in the first place the Pontiff shows by the very example he uses that he is speaking of conditions which oblige to some immoral act, whereas the condition of preserving virginity by mutual agreement is a thing good in itself. In the second place, the Pontiff was speaking of conditions which were *positively* contrary to the *tria bona* of marriage. As PALMIERI remarks, the condition in the Corpus Juris means "Contraho tecum si in commixtione carnali *impedire* velis ne proles existat. Sane exempla hujus conditionis allata a canonistis huc spectant, nimirum vel suffocando prolem, vel poculum sterilitatis bibendo. . . . . etc."[12] In fact there are so many differences between these two conditions "si generationem prolis evites" and "si continentiam servare velis" that one can deduce nothing from the one, condemned as invalidating by GREGORY IX, with regard to the other, which we are defending as compossible with marriage.

But the objection is urged further. ROSSET[13], for instance, argues that if marriage with such a *licit* condition is valid, in view of the distinction between proximate and radical right, then a marriage with a condition to practice onanism could also be valid. For one could make the same distinction and say that the parties intended to grant the radical right to real marriage acts but only denied the proximate right to such acts. And thus all meaning would be taken from the chapter "De conditionibus appositis",—and even the condition "si generationem prolis evites" would not be invalidating. Others make use of a similar argument[14].

The answer is quite obvious. It is the teaching of moralists and canonists alike that a marriage entered into with an agreement to practice onanism *is* valid, if the agreement merely means that the parties intend to abuse the marriage right once validly transferred[15]. In other words this illicit agreement is not invalidating if the parties really intend to transfer validly the *right* to true marriage acts, and once really married

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[11]For example: CONINCK disp. 24 dub. 4 n. 47; DE DICASTILLO disp. 5 dubit. 12 n. 156; MASTRIUS, In IV Sent. lib. 4 q. 3 art. 3 n. 111; q. 5 art. 1 n. 162; VASQUEZ disp. 125 c. 6 n. 66; KRIMER IV, n. 798, 799; BILLUART tom. 10 De Matr. diss. 3 art. 5; PALMIERI thes. 3 n. VI; HUARTE n. 168, 169.

[12]PALMIERI thes. 3 n. VI; also HUARTE De Matr. n. 168.

[13]ROSSET De Matr. I, n. 197.

[14]E.g. SALMANTICENSIS Curs. Theol. Mor. tr. 9 c. 7 dub. 3 n. 99; LEITNER p. 135.

[15]E. g. CAPPELLO De Matr. n. 631; S. R. Rota In Parisien. AAS IX (1917) p. 33 sq. (Coram SEBASTIONELLI 10 May 1916); And cf. MAHONEY, art. cit. in The Clergy Review 13 (Apr. 1936) 121 sq. It may be remarked incidentally here, that if the agreement to practise complete continence does not invalidate, then the agreement to make use of the "safe period" is likewise not necessarily invalidating.

to sin against their obligations. This is the same thing as saying that the illicit condition "si generationem prolis evites" does not invalidate marriage if the partners intend to grant one another the radical right to true marriage acts and *attempt* to withhold from one another the proximate right to the same. It goes without saying that such an attempt, such an agreement is itself invalid,—"non vitiat sed vitiatur"; and it is not possible for them to renounce the proximate right to true marriage acts by such an agreement. But if they really intend to contract marriage, then the marriage is valid in spite of such an agreement[16].

This same argument against our position drawn from the chapter "De conditionibus appositis" can be put in still another and more philosophic form, thus: a condition against any one of the *tria bona* of marriage invalidates whether it be licit or illicit; for the *tria bona* are substantial in marriage. But the condition of perpetual virginity is a conditon against the *bonum prolis*. Therefore it invalidates the marriage.

In answering this objection we can make use of a principle which is stated clearly for us by SANCHEZ following ST. THOMAS[17]: "It is to be observed that one thing is to be thought of the three benefits of marriage as regards the obligation and another as regards the execution: for as regards the obligation all of them are of the essence of marriage; for the partners are obliged in virtue of the marriage to life in common, to render the debitum to one another, not to prevent offspring, and to educate offspring if they have any. And this is clearly the opinion of ST. THOMAS . . . . . In fact RICARDUS and TURRECREMATUS say very well that the benefit of fidelity is essential not only as regards the obligation of rendering one another the debitum, but also as regards the obligation of remaining faithful by not giving over one's person to another. . . . . If however these benefits are considered as regards the execution and in themselves, then the benefit of the Sacrament which is the indissoluble bond, is of the essence of the Sacrament of marriage, but not fidelity and offspring, as ST. THOMAS teaches very well."

In other words one must make the distinction which we made above

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[16]In practice it will be hard to judge what the contracting parties intended. If from the circumstances it is apparent that they have made the agreement to practise onanism so essential a condition of the consent that they do not want to be married at all unless they have the "right" to practise it, then the marriage is invalid; for in that supposition they do not grant even the radical marriage right. But generally in such agreements the presumption is that they really intend to marry but agree at the same time to abuse marriage. Cf. CAPPELLO De Matr. n. 631 and MAHONEY loc. cit. Cf. Bouscaren, Canon Law Digest, vol. II p. 127 sq.

[17]SANCHEZ lib. 2 disp. 29 n. 12. Compare ST. THOMAS in IV Sent. lib. 4 dist, 31 q. 1 art. 3 corp. and Suppl. q. 49 art. 3 corp.; KRIMER IV, n. 800, 801 and 803. SANCHEZ of course does not use the principle to answer this difficulty. He holds that the condition invalidates.

at the end of Chapter II, between the *bona acquirenda* and the *bona constituentia* of marriage considered as a state. The *bona acquirenda*, or the realizing of the ends of marriage, are not essential to it and are not a part of its substance. It is only the *bona constituentia* that are essential to marriage. And these are the rights and obligations which form the essential marriage bond. Hence to the difficulty: a condition against any one of the *tria bona* invalidates, etc., we reply: a condition contrary to any one of the *bona acquirenda* invalidates, *negatur;* against any one of the *bona constituentia, concedo.* But the condition of preserving virginity is not contrary to that fundamental constituting element of marriage which is the radical right to the marriage act. It is contrary only to the actual realization of the end of marriage; (and even to this end it is only negatively contrary as we have seen). Hence if the distinction between the radical and proximate right is valid, and if only the former, not the latter, is a constituting element in marriage, then the condition of preserving virginity understood as we understand it is not contrary to the *bonum prolis* considered as an essential of marriage, that is, as a *bonum constituens.*

We consider it superfluous here to prove again a point already established[18], to wit, that the actual realization of the ends of marriage, even of the primary end is not essential to it. It is necessary only that the marriage be objectively ordered to all three of its essential ends, whether their realization for one reason or another is possible or not[19].

But the final instance of the objection we have been considering must now be presented. We just remarked, that *if* the radical right alone is essential, and *if* the distinction between the radical and proximate right is valid, and *if* the marriage remains objectively ordered to its primary end, even with such a condition, then the condition is not contrary to the substance. These are the *ifs* which the opponents of our thesis refuse to accept. They argue that one can distinguish between a radical and proximate right in other matters of justice but not in the case of the marriage right. And since this is the principal objection offered by the opponents we will present it in the words of one of them, UBACH, who gives it perhaps more forcefully than any other[20] "Therefore he who wishes to contract marriage and at the same time to make an agreement not to consummate, wishes, inasmuch as he contracts marriage, to grant to the other the right to consummate, and at the same time wishes, inasmuch as he makes the agreement that he shall not grant to the other the right to consummate;

[18] See above Chap. I p. 16 sq.

[19] We will inquire below in what sense the contracting parties must have the ends of marriage in their intention in order to contract validly. Cf. Chap. IX.

[20] UBACH, II, n. 2681. Most of the opponents use this argument in one form or another; notably: D'ANNIBALE III, n. 443 note 4; CAPPELLO De Matr. n. 636; KNECHT p. 691 note; KREUTZWALD, "Josephsehs", in Kirchenlexikon VI, col. 1878, 1879; VAN DE BURGT pars 2 paragr. 3 n. 68; CHELODI n. 125; etc. Cf. UBACH, II (1st ed.) n. 845, note 2.

and these things indeed cannot stand together, and render the marriage null, as we said above concerning a limitation attached to the consent, no matter if it regards a thing in itself most licit, but repugnant to the substance of marriage. There are not wanting well-known euthors, it is true, who hold the contrary as probable, introducing the distinction between the radical right and the use of the right. Now this distinction can have place indeed, in contracts in which are transferred rights *in rebus* or *ad res*, or whose matter are *things*, in which accordingly the *ius in re* is one thing, and the *ius ad usum hujus iuris*, or, what amounts to the same thing, the *ius ad usum rei* is another, and one can exist without the other, as in landlord and tenant; but not in the marriage contract, which consists in handing over the right to *acts*, or to the *use* of marriage, where therefore the distinction between *ius ad usum* and *ius ad usum hujus iuris* can have no meaning. GASPARRI says n. 1009 (also DE SMET n. 156) that it is always possible to distinguish the right from the exercise of the right, not noticing that when in questions of this kind we speak of exercise, of use, we do not mean actual exercise, actual use, but the right to exercise; for we are speaking of the celebration of contracts; but rights are the proximate matter of contracts, not precisely the actual exercise; for, in contrects rights are transferred, not acts; treating therefore of tbe metter of the marriage contract, since it is a right to exercise it cannot itself be dietinguished into a right to exercise and the exercise itself; for thus thle letter would signify the mere actual exercise, no right at ell, end therefore would no longer be matter of a contract".

Othere give the objection a slightly different turn, e.g. VAN DE BURGT[21]: "It ie helpful to note that in the present matter the marriege contract differs from other contracts; since to the hending over of the dominion of the thing i.e. of the person, there is essentielly attached the faculty of using the person of the other party exclusively, not the actual using indeed nor the use itself, but the power to use exclusively; and accordingly it is not sufficient for the validity of marriage to hand over the mere dominion of the person. . . . . For in marriage there is handed over a mutual right to the person with a view to the generation of offspring, and this right seems to embrace both the dominion over the person and the faculty of using it for the sake of generating offspring".

These objections (or rather this objection, for they are both different forms of the same difficulty) can be put briefly as follows: To distinguish a right of indirect dominion, which is a right of use, from the right to exercise the right of use is ridiculous[22]; or with LE BRAS[23]: "*What can a*

[21]VAN DE BURGT pars 2 paragr. 3 n. 68; Cf. also SCHMALZGR. lib. 4 pars 2 tit. 5 n. 122 ad 4; LINNEBORN paragr. 41 n. IV p. 336.

[22]Cf. above Chap. IV p. 60.

[23]LE BRAS, "Mariage," in: Dict. Théol. Cath. vol. 28, col. 2296: "En quoi peut consister un drolt que l'on accorde sous la condition qu'll ne sera jamais exercé?"

right consist in which one grants under the condition that it shall never be exercised?"

It will be sufficient, as an answer to this difficulty to refer again to the doctrine laid down in Chapters III and IV on the nature of the radical right in marriage. For if this were a valid objection it could be urged not only against the condition of preserving virginity, but also against the reality of any marriage in which the proximate right of use were ligated *ex justitia*. If there were no possibility of distinguishing the *ius in corpus* from the right to actual use of copula, then a marriage in which for example on account of sickness the copula could not take place without injustice would cease to be a marriage. For no contract can exist when any one of its essential rights and obligations ceases to exist. It is just as certain, then, that this is a valid distinction as it is certain 1) That the essence of marriage *in facto esse* is the *jus in corpus;* 2) That marriage still exists and the *jus in corpus* still exists when for some reason or other the marriage act cannot be exercised without injustice. And it was to make these points clear that we devoted all of Chapters III and IV to an accurate inquiry into the nature of the radical right to the person in marriage. In those chapters we established: 1) That a right is a moral relationship of preference that enables a man to call a thing his own; 2) That there are some forms of indirect dominion which in their permanent character, and in their extensive comprehension of the utilities of an object admit of being distinguished into a proximate right of use, and one more fundamental and remote which remains even when the proximate right is taken away; 3) That the essential marriage right is such a comprehensive right of indirect dominion; 4) That when separated from the proximate right of use this radical right still deserves to be called a right, still has an intelligible content and utility. And we indicated what that content and utility is. It is still a right in virtue of which one partner can call the other's person *his own*, and his own precisely with a view to conjugal acts. It is still a right in virtue of which those conjugal acts are *his* in a very real sense.

Now everything we said there is equally applicable in replying to the difficulty we are considering here. For the substance of marriage is always the same whether we look at it in a marriage which is already *in facto esse*, or look at it as the *object* to which the parties here and now are to give their consent. If the radical right is not destroyed or meaningless when separated from the proximate right in a marriage already contracted, then it is not necessarily contradicted by a condition which excludes the proximate right at the moment when consent is being given[24].

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[24]We are answering the difficulty here only from the point of view of a contradiction in the *object* of consent. With regard to the *intention* of copula required in the contracting parties at the time they give their consent see below Chap. IX.

The *jus in corpus*, therefore, is essentially a right in virtue of which each partner can call the other's person *his*. Marriage makes husband and wife *belong* to one another. This is what St. Paul meant when he said[26]: "The wife hath not power of her own body but the husband. And in like manner the husband also hath not power of his own body but the wife"[26]. This *potestas corporis* of St. Paul is called *jus in corpus* by the Code. And since it is a *marital* right to the partner's person, which is accordingly always and essentially ordered to the acts of conjugal life, the Code calls it a "jus in corpus *in ordine ad actus*" etc [27].

Now even in a marriage contracted with a condition of preserving virginity the partners give themselves to one another, and belong to one another in such a way that the right to one another's persons is always essentially ordered to the copula. As BILLOT says[28]: "Sane potestas quae necessario et essentialiter in matrimonio datur non est nisi potestas ad actum copulae praecise ut exercibilem citra malitiam fornicationis aive *accessus ad non suam*". And KRIMER, speaking of marriage with the condition "si usus matrimonii erit fornicarius" says[29]: "Volens ut copula sit fornicaria excludit *suitatem* corporis quo per copulam utitur, consequenter excludit voluntatem cujus objectum ait *ea suitas*, seu *jus conjugale*, quae tamen voluntas est de substantia matrimonii"[30].

Therefore just as in a marriage already contracted the *jus in corpus* is still essentially and positively ordered to the marriage act even when that act cannot be exercised without injustice, so, too, in a marriage contracted with a condition to preserve virginity the object to which the partners consent is a "jus in corpus *in ordine ad actus* per se aptos" etc. The marriage act will belong to them in the sense explained in Chapter IV, even if they cannot exercise it. And in order to bring out even more

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[26]I Cor. VII 4.

[26]For the interpretation of this passage with reference to the *jus in corpus* Cf.: SUAREZ De Incarn. pars 2 disp. 7 sect. 1 post mediam part. sect.; MASTRIUS In IV Sent. lib. 4 disp. 7 q. 1 art. 1 n. 3; LAYMANN Theol. Mor. lib. 5 tr. 10 pars 2 c. 1 n. 1; CONINCK disp. 24 dub. 1 n. 3; CLERICATUS Decis. 2 n. 8; FISHER p. 112; KLEE, p. 1.

[27]Can. 1081 § 2.

[28]BILLOT De Sacr. II, p. 342.

[29]KRIMER IV, n. 798, 806, 807, 811 817. Compare MASTRIUS In IV Sent. lib. 4 disp. 7 q. 1 art. 1 n. 9; and BALLERINI-PALMIERI VI, n. 228 note a, (PALMIERI).

[30]Compare LIBERIUS De Matr. disp. 6 controv. 10 n. 170 ad fin.: "Ex conjugio duae dimanant obligationes; prima negativa de non cognoscenda aliena; positiva altera de usu corporis si exigatur. „ Prima consequitur infallibiliter matrimonium, secus altera. . . . . This can be properly understood as long as one holds that marriage is always and essentially and positively ordered to the copula. LIBERIUS seems not to have held this however; cf. Chap. IX note 9.

clearly the meaning of this *ordinatio ad copulam* in such a marriage the authors are accustomed to enumerate the real effects which such a marriage would bring about with regard to the use of the copula[31]. For instance people who thus gave a restricted consent would remain incapable of marrying any one else, i.e. of granting the right to acts of conjugal life to anyone else. If they were to change their minds later and revoke the agreement their intercourse would not be fornication. If one of the partners in violation of the agreement forced the other to intercourse he would not be guilty of a sin against chastity, but against justice. If either one had intercourse with some other person, the sin would not be fornication but adultery[32].

And with these considerations we think we have answered the question: "What can a right consist in which one grants under the condition that it shall never be exercised?"—and have shown that it is not ridiculous to distinguish in marriage a fundamental right of indirect dominion from the right to exercise that right.

Our argument that a condition *de non usu* is not contrary to the substance of marriage, and contradicts nothing essential to it, finds strong confirmation in the practice, formerly imposed by the Church, of allowing the newly married partners two months to deliberate about entering religion. During these two months neither one had the right to require the debitum against the will of the other. To do so would have been a sin of injustice[33]. In other words according to the law itself, there was an implicit condition limiting the use of marriage *ex justitia*. Thus ST. THOMAS[34]: "Before the carnal copula the person of the one is not entirely

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[31]Cf. GURY-BALLERINI II, n. 752 note a; WERNZ-VIDAL V, n. 521 ad fin.; LEHMKUHL II, n. 882; MASTRIUS In IV Sent. lib. 4 disp. 7 q. 3 art. 3 p. 108; BALLERINI-PALMIERI VI, n. 231. The authors also note (LÉPICIER De Matr. q. 5 art. 4 n. 7 and BALLERINI-PALMIERI loc. cit.) that to renounce one's right to the use of marriage is to make use of it to that extent. ROSSET I, n. 198 objects that since they have no *jus in corpus* before marriage it is idle to speak of renouncing it in the contract. But this is a quibble. If the parties have no *jus in corpus* to dispose of before marriage how can they get married at all?

[32]ROSSET I, n. 198 says that to point to these "real effects" is a mere begging the question. For they suppose a valid marriage and that is what we wish to prove. But this is likewise a quibble. We do not argue from these real effects in order to prove that the condition is not against the substance. But having proved *aliunde* that the condition is not against the substance and that the marriage is valid, and then being confronted with the false assertion that a radical right is meaningless in such a marriage, we point to these effects in order to show the falsity of the objection.

[33]SANCHEZ lib. 2 disp. 22. The Code has revoked this privilege can. 1111: "Utrique coniugi *ab ipso matrimonii initio* aequum ius et officium est quod attinet ad actus proprios coniugalis vitae".

[34]In IV Sent. lib. 4 dist. 27 q. 2 art. 3 ad 2.

transferred to the dominion of the other but *under the condition, si ad frugem melioris vitae non convolet:* but the aforesaid transfer is completed by the carnal copula; because then each enters into corporal possession of the dominion which has been transferred: hence also before the carnal copula he is not held immediately to render the debitum after the marriage is contracted *per verba de praesenti,* but he is allowed a space of two months". CONINCK says[35]: that every Christian marriage is contracted conditionally, scil.: "unless I enter religion"; he says: "Therefore neither of the partners is obliged precisely by the contract itself ever actually to render the debitum except under the condition: if he does not wish to enter religion; therefore the obligation of rendering the debitum is not of the essence of marriage when being contracted, nor is the contrary obligation or condition of never using it repugnant"[36]. MASTRIUS says[37]: that the obligation to the copula is always granted conditionally: *"if* it is asked legitimately".

Now from this general doctrine of the presence of these tacit conditions in matrimonial consent, which were always present in the old law, and certainly did not invalidate the consent, we can deduce with BALLERINI the principle[38]: "The contract is made validly, and accordingly the right to one's own person is transferred to the other, even if the contracting party while granting that power and right attaches some condition. . . . . " And having explained how marriage is valid even with this condition excluding use during two months, he continues: "The marriage bond perseveres with the obligation of rendering the debitum remaining suspended not only for those two months granted for deliberating but for the whole time of the noviceship. . . . . Now cannot that which the laws of the Church concede be equally well granted by the free concession of the one to whom the right pertains? What prevents them from making an agreement by mutual consent not only for two months but for two years in which they can deliberate? Why could they not cede this right to one another for example, until the husband gets a position adequate for the support of children? Why can they not agree of their own accord not to consummate marriage until after their fortieth or fiftieth year? And if so, why not also for their whole life?"

As TIMLIN remarks[39], ,this confirmation of our proof "is no caustical

[35]Disp. 24 dub. 4 n. 45.

[36]For a similar argument cf. WERNZ-VIDAL V, n. 531; BILLUART tom. 10 De Matr. diss. 3 art. 5 obj. 12; BALLERINI-PALMIERI VI, n. 230; TIMLIN p. 315; BRANCATUS disp. 20 art. 1 n. 12, 13.

[37]MASTRIUS In IV Sent. lib. 4 disp. 7 q. 3 art. 3 n. 111.

[38]BALLERINI-PALMIERI VI, n. 230. It is to be noted, too, with Vidal (WERNZ-VIDAL V, n. 521 note 46 circa fin.) that when the parties thus renounce their right they do not so much impose an obligation on one another as that each imposes an obligation on himself.

[39]P. 315.

counter-argument". It establishes quite clearly the fact that the Church herself recognized for centuries the validity of marriage in which there was an implicit condition excluding *ex justitia* the actual use of marriage for two months. Against it however is urged the objection that *there is no parity* between the condition of preserving virginity and the condition *de non usu per bimestre*,—and that for several reasons.

First the *privilegium bimestre* is only a *temporary* thing whereas the condition to preserve virginity is perpetual. One can easily see how a *jus in corpus* can be granted with a temporary restriction, and still have real meaning as a right; but when the restriction is perpetual it is a different matter. Hence there is no parity between the two conditions.

In reply: the marriage right is essentially *perpetual*, and a consent which excludes the marriage right even temporarily is not a real consent, and does not give rise to a valid marriage. Hence if the condition not to use marriage is really against the substance, it invalidates marriage whether it regards a perpetual or only a temporary exclusion of the use of marriage[40]. And conversely if the condition to exclude use temporarily is not against the substance (as we have proved from the *privilegium bimestre*) then the condition which excludes use perpetually is likewise not against the substance[41].

Secondly, it is argued, that the two months priviiege is a condition which is *de jure* attached to the contract and hence is present whether the parties think about it or not. Furthermore it does not suspend the validity of the act. Hence it is different from a condition to which the parties themselves attach their consent. Thus Laymann[42].

But we have already seen that the condition of preserving virginity does not *suspend* consent either. As for the condition which *ineat de jure*, this makes no difference to the point at issue. The law (especially the *positive* law as in this case) can no more set a repugnant condition to the marriage contract than the parties themselves. CONINCK says, to the point[43]: "The fact that a certain condition is or is not a part of a certain contract as a result of positive law does not bring it about that the condition is more, or less repugnant to its essence, but only that it depends more or less on the mutual consent of the contracting parties". And he concludes further: "Hence there is the further conclusion that the condition of preserving virginity is validly attached to the contract even if the spouses have not determined ever to enter religion, for the intention of entering religion does not bring it about that that condition be more, or less repugnant to the essence of marriage. . . . . "

Thirdly, it is urged that there is no parity with the case of the *privile-*

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[40]Cf. SANCHEZ lib. 5 disp. 10 n. 5; CAPPELLO De Matr. n. 631.

[41]GASPARRI II, n. 900 seems to think otherwise.

[42]Lib. 5 tr. 10 De Matr. para 2 c. 7 n. 9.

[43]CONINCK disp. 24 dub. 4 n. 41 and 45; PONTIUS lib. 8 c. 11 n. 17.

gium bimestre because that privilege does not *oblige* the partners to abstain from use, not to enter religion but merely *permits* them the same. VAN DE BURGT for instance argues thus:[44] "It is permitted indeed to the contracting parties to make an agreement that one or both *may* enter religion before the marriage is consummated; since that condition is contained in matrimony [he means in the old law]. But a condition that they *must* or that one of them *must* enter religion before or after the consummation is not contained in matrimony[45]".

But here too, there is a lack of conaistency. For an agreement by which the parties may enter religion necessarily implies that they renounce their proximate right to use. They are obliged not to use marriage, or at least one of them is, if the other wishes to use the *privilegium bimestre*. Hence CONINCK concludes with justice[46]: "It follows that marriage is contracted validly with this condition: that neither can be obliged to render the debitum to the other, or that both be obliged to preserve chastity or to enter religion before consummation."

By way of summary then, we conclude this chapter where we began it, reasserting the fundamental positive proof of our thesis: the condition to preserve virginity does not contradict nor exclude any essential element in marriage. Therefore it is not a condition agalnst the substance, and does not invalidate marriage. And the two principal objections against this argument, and against the thesis itself, first, that the condition is contrary to the *bonum prolis*, and secondly, that it renders the *jus in corpus* meaningless and unintelligible, have been sufficiently answered. Finally the argument itself finds a strong confirmation in the disposition of the old law which granted the privilege of two months' time for deliberation about entering religion.

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[44]VAN DE BURGT pars 2 paragr. 3 n. 70.

[45]Cf. also LAYMANN lib. 5 tr. 10 pars 2 c. 7 n. 9.

[46]Disp. 24 dub. 4 n. 43.

CHAPTER VIII

THE ARGUMENT FROM POST-MARITAL AGREEMENTS

It is common teaching of theologians that *after* marriage the partners can make a valid agreement to live continently. No dissenting voice, as far as we have been able to discover, has ever been raised against this proposition[1]. And even if the agreement is one binding in justice, and intended to be perpetual, even if it is made one hour after marriage is celebrated and before the marriage has been consummated, it can still be validly entered into. The fact that the Church permits married partners to separate and enter religion by mutual agreement is a confirmation of the same proposition[2]. For a husband who violated his agreement and demanded his matrimonial "rights" from his cloistered wife would certainly sin not only against religion but also against justice[3].

From these facts we argue as follows (in three steps) :—

1) If an agreement to preserve chastity can be validly entered by persons already married, then the agreement is not repugnant to the substance of marriage,—at least to marriage considered in *facto esse*. For if it were repugnant to the substance of marriage it could not exist validly along with marriage[4]. The attempt to make it would be futile. For instance an agreement made after marriage obliging the husband to seek another wife, would be invalid because repugnant to the substance of marriage. Let no one object that it would be invalid merely because it is a *sinful* contract, and not precisely because it is contrary to the substance. For the only reason why it *is* sinful is because it is contrary to the substance; and there was a time—in the Old Testament—when such an agreement was not necessarily sinful, and was not against the substance. But now that marriage has been recalled to its pristine unity by the Christian law, the attempt to add such an agreement to a marriage already contracted is null and void. Similarly if a pact to preserve virginity were contrary to the substance of marriage it could not be validly entered by the partners. But the universal teaching of theologians tells us that such an agreement can be validly made.

2) If the agreement to preserve chastity is not against the substance of marriage considered *in facto esse*, then it is not against the substance of

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[1]Cf. authors cited in note 6 below.

[2]Cf. can. 1119, 1130. In the old law there was also the "privilegium bimestre"; cf. above Chap. VII p. 110.

[3]The case of Mother Connelly, foundress of the Sisters of the Holy Child, is well known.

[4]Cf. for example CONINCK disp. 24 dub. 4 n. 43.

marriage considered *in fieri*. For the substance of marriage is always the same, whether we look at it as coming into being, or as already produced. Marriage *in fieri* is the consent which makes marriage. And that consent, as we said so often, has as its essential object the essence of marriage— the same essence which is going to continue to exist as the *state* of matrimony once consent is complete. Hence whatever is contrary to the substance of marriage considered *in facto esse* is also contrary to it at the moment when consent is given, and vice versa[6].

3) If an agreement to preserve chastity is not against the substance of marriage *in fieri*, then an agreement in the form of a condition on which the consent depends is not against the substance. For as we have already seen in Chapter VI, and will see again in Chapter IX, the fact that an agreement is attached in the form of a condition does not make it any more or less repugnant to the substance. An intention contrary to the substance, if express and prevailing, is just as invalidating as a condition.

Therefore, we conclude, that since the partners can after marriage make a valid agreement to preserve chastity, the *condition* to preserve virginity does not invalidate matrimonial consent.

Although this argument is proposed with more or less detail and accuracy by many of the defenders of our thesis[6], there are some objections offered to it which deserve consideration. They regard the first and especially the second step of the argument—the jump from "after" marriage to "before" marriage.

LAYMANN for instance argues[7]; "Contracts have this in common, that nothing repugnant to their nature or substance can be attached in the contract itself, although *afterwards* it can be attached by way of a new contract partially repugnant to the previous one, as Sanchez teaches, lib. 5 disp. 19 n. 5 and 12. Thus in the case of matrimony, though a condition repugnant to its substance cannot be attached from the beginning, it can nevertheless be attached afterwards, by a new mutual agreement of continency, temporary or perpetual; . . . . . " And Pirhing says[8]: "Although a certain condition repugnant to the substance can be attached afterwards to a marriage already contracted, it cannot however be attached from the beginning".

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[6] BILLUART tom. 10 De Matr. diss. 3 art. 5 obj. 2: "Pactum de servanda castitate, consistere potest cum matrimonio iam contracto adeoque et contrahendo: quod enim est contrarium essentiae alicujus rei, numquam cum ea sive in fieri sive in facto esse consistere potest; vel enim illam elidit, vel ab illa eliditur".

[6] For example: CONINCK Disp. 24 dub. 4 n. 43 and 44; CASTRAPALAO tom. 5 tr. 28 disp. 3 punct. 11 paragr. 4 n. 6 and 7; DE DICASTILLO disp. 5 dubit. 12 n. 158; WALDENSIS, De Sacramentis c. 130 n. 2; BALLERINI-PALMIERI VI n. 231; CATHREIN, n. 531.

[7] LAYMANN Theol. Mor. lib. 5 tr. 10 pars 2 c. 7 n. 9.

[8] PIRHING lib. 4 tit. 5 paragr. 3 n. 13.

But this can only be called bad reasoning. There is no parity between marriage and other contracts. Marriage is *sui generis*. Other contracts get their essence from the decree of human legislators or the will of private individuals, but marriage is constituted by the natural and Divine positive law[9]. In other contracts the parties are free to abolish the whole contract if they like; hence it is clear that they can abolish part of it at any time. But over matrimony, whether looked at *in fieri* or *in facto esse*, the contracting parties have no power; neither have they power over any of its essential properties. Hence they cannot abolish a part of the marriage they have contracted. If the proximate right to use marriage were a part of the essence of marriage, then once consented to it could never be given up. The attempt to give it up would be invalid. Accordingly, the fact that they can and do give it up validly by vow after marriage is contracted is a proof that this proximate right to copula was never a part of the substance of the contract.

But it is urged: one cannot argue from the fact that a certain agreement can be added validly after marriage to the conclusion that it is not against the substance of marriage *in fieri;*—for there are many things essential to marriage in the making which are not essential to it as a state. For instance, supervenient impediments have no power to destroy marriage *in facto esse*, and yet they invalidate it *in fieri*. Thus in the old law affinity arising from intercourse with a near relative of one's partner if preceding marriage invalidated, if supervenient, of course did not. And the same thing would be said of the consent itself. If the partners withdrew it after marriage, the withdrawal could not affect the validity of the marriage; but a lack of consent or a consent deficient through fear, would prevent the contracting of a valid marriage. Or again, supervenient insanity would not destroy marriage but antecedent insanity would invalidate consent. Hence (they argue) it is improper to conclude from what is or is not essential in marriage looked at as a state, to what is or is not essential to marriage looked at in the making[10].

We reply with BILLUART[11]: "The fact that an impediment supervenient to matrimony can coexist with it when it is already contracted, but not however when it is being contracted, is no objection; for the disparity is in this, that a diriment impediment lies *ex parte causae*, namely, rendering the *person* incapable of contracting: and a defect in an efficient cause has indeed the power of impeding an effect which is to follow, but not of destroying one already effected; for an effect depends on its cause in *fieri*, not *in facto esse;* but a condition or obligation which is *repugnant*

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[9] BRANCATUS disp. 20 art. 1 n. 12 and 14.

[10] This argument is proposed and answered by BILLUART tom. 10 De Matr. diss. 3 art. 5 obj. 2; DE DICASTILLO disp. 5 dubit. 12 n. 158; CONINCK disp. 24 dub. 4 n. 44; etc.

[11] BILLUART tom. 10 De Matr. diss. 3 art. 5 obj. 2.

to the essence of the contract itself is repugnant to it whether *in facto esse* or *in fieri*, since the essence is *the same in fieri and in facto esse*." In other words the impediments etc. mentioned in the objection are not deficiencies in the object of consent. They do not touch the essence of the marriage therefore,—for this is the object of consent. They invalidate the consent because they make it deficient subjectively, not objectively. They are incapacities in the persons consenting, not in the thing consented to.

But it is urged still further and finally: et least in the case of *impotency* we have en impediment which touches not merely the capacity of the contracting parties but the object of consent itself. Perpetual antecedent impotency invalidates marriage precisely because the object of consent is lacking. There can be no *jus in corpus* where the *corpus*, so to speak, is lacking. Yet supervenient impotency does not invalidate marriage, but leaves it intact. Hence the principle: "A thing which is not repugnant to the substance of marriage *in facto esse* is not repugnant to the substance of marriage *in fieri*," is not universal, and nothing can be concluded from it[13].

Before answering this difficulty, it is well to note that it is not precisely a difficulty against our thesis. It is rather a difficulty against the *particular argument* we are proposing in this chapter. Even if we could not answer the difficulty the thesis would still stand proved from the intrinsic arguments of Chapters VII and IX. But the difficulty is an important one, not merely from the viewpoint of the defense of the argument of the present chapter, but also for the defense of the general principle: "The essence of marriage is the same *in fieri* and *in facto esse*". For this latter principle is intimately connected with the whole question of the essence of marriage—or for that matter, the essence of any contract.

It is true that when giving the reason why impotency is an impediment to marriage according to the natural law, the almost invariable explanation is that given in the objection above; namely, that where there is impotency, the essential object of consent is lacking. But if this is the true reason for the impediment, how can one explain that the marriage bond subsists when such impotency supervenes? As we have shown, the marriage bond consists in e group or rights and obligations, the principal one of which is the "jus in corpus *in ordine ad actum maritalem*," and it seems at first sight impossible to understand such e right where physical potency is lacking. Hence with the advent of impotency the marriage bond should eutomatically collapse. If I make e contract that gives me a right to use e certain horse, the existence of the horse is essential that there be e contract *in fieri*. But the existence of the horse is equally essentiel thet the contract (or bond resulting from the contract) may continue to exist *in facto esse*. And if the horse is later destroyed my right to it is destroyed end with it the contractual bond implied in such e right.

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[13]KNECHT p. 592 note, argues in e somewhat similar way.

For not even God could make a contract which would continue to exist without one of the elements which He or nature has made essential to it.

Some of the older authors answer the difficulty after a fashion. They explain it by saying that if God worked a miracle and restored physical potency, the marriage right would still be there; or they say that once the bond has been brought into existence, being of its nature indissoluble, it cannot collapse; or they say that many things are essential to marriage *in fieri* which are not essential to it *in facto esse*[13].

But it is evident that none of these answers reaches the real heart of the difficulty. Hence we suggest another one. To us it seems that the real reason why impotency is an impediment from the natural law, is not that physical potency is absolutely essential as the *object* of consent, or that a *jus in corpus* exist, but because an impotent person is *iure naturae inhabilis on other grounds*. Just as the impediment of consanguinity makes a father juridically incapable by the law of nature of marrying his daughter, not because the proper object of the contract is lacking but because of other reasons, *moral* reasons, derived from the natural law, so it is not inconcelvable that the impediment of impotency should be explained, similarly, as involving a *natural moral incapacity* for marriage. And the history of the legislation on this impediment confirms this impression.

The principal documentary source of the present legislation on impotency is the letter of SIXTUS V, "Cum Frequenter" 27 Jun. 1587[14]. In it he condemned the marriage of castrates as invalid according to natural law, and this whether their impotency was known to the other party or not. Yet SIXTUS does not give as the reason for the impediment the fact that in such marriages the essential *object* of consent is missing. He says: "Nos igitur attendentes, quod secundum Canonicas sanctiones, et naturae rationem, qui frigidae naturae sunt, et Impotentes, iidem minimo apti ad contrahenda matrimonia reputantur. . . . . " etc. And then: "Et insuper considerantes quod ex Spadonum hujusmodi et Eunuchorum conjugiis *nulla utilitas* provenit, sed potius *tentationum illecebrae*, et *incentiva libidinis* orientur. . . . . " etc. The reasons he gives point rather to a natural *moral* incapacity on the part of the contracting parties than to a defective object of consent. It would have been very easy for him to indicate the one clear-cut reason commonly assigned today,—namely a deficiency in the object of consent.—if he had thought that to be the real reason. For it is a very satisfactory reason at first sight. But he did not do so.

It is interesting, too, (without going into the whole history of the question), to glance at what ST. THOMAS has to say about the reason for the impediment of impotency.

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[13]Cf. for example MARTIN PEREZ disp. 37 sect. 10 n. 1, and 3.

[14]GASPARRI, Fontes I, n. 298. Cf. G. AREND, "De genuina ratione imped. impot.," in: Ephem Theol. Lov. 9 (1932) p. 36 sq. and Jos. MAYER, Gesetzliche Unfruchtbarmachung Geisteskranker (Freiburg im Breisgau 1927) p. 403 sq.

St. Thomas does not seem to have held that phyeical impotency was an impediment to marriage precisely because the object of consent was lacking.

For he held on the one hand that when the impotency is *known* to the parties they can marry valldly[15]. He says for instance[16]: "Sicut autem per impotentiam coeundi efficitur aliquis impotens ad soivendum debitum ut omnino non possit soivere, ita per servitutem ut libere debitum reddere non possit. Et ideo sicut impotentia coeundi ignorata impedit matrimonium, *non autem si sciatur*, ita conditio servitutis ignorata impedit matrimonium, non autem servitus scita". And again in the article "Utrum frigiditas matrimonium inpediat"[17], he proposes himself this difficulty: "Si scit mulier virum esse frigidum quando cum eo contrahit, *quantum est de se*, matrimonium non impedit". And answering this difficulty ST. THOMAS does not deny that there is true marriage in euch a case but admits it in no uncertain terms[18]. And again[19]: "Quaedam autem impedimenta eunt quae faciunt matrimonium inefficax ad soiutionem debiti. Et quia in voluntate nostra consistit debitum nobis relaxare ideo talia impedimenta, ei sint cognita, matrimonium non tollunt, sed solum quando ignorantia voluntarium excludit. Et taie impedimentum est servitus et impotentia coeundi"[20].

On the other hand ST THOMAS held that impotency in general was a diriment impediment[21], and apparently held that it was an impedimant according to the natural law[22]. Since, then, a deficiency in the essential o*bject* of consent would be equally diriment whether known or not known, it doee not seem likely that ST. THOMAS would consider this the reason for the impediment. He would hardly have been guilty of saying that two persons could contract with regard to a certain non-existent o*bject* as long as they were aware it was non-exietent.

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[15]WERNZ, Jus Decretalium IV, n. 345 note 32 and note 37 doubts whether ST. THOMAS held this view. Cf. also CAPPELLO De Matr. n. 347 note 16. But the texts are irrefutabie.

[16]Suppl. q. 52 art. I in corp.

[17]Suppl. q. 58 art. 1.

[18]Suppl. q. 58 art. 1 ad 4. At the end of the paragraph ST. THOMAS says "Et propter hoc *Magister* ponit quod haec duo faciunt personas *non omnino* iliegitimas". The "haec duo" are slavery and impotence in *Mag. Sent* lib. 4 dist. 34 c. 1;—not slavery and consanguinity, ths latter of which according to ST. THOMAS does make a person "omnino iliegitima" as far as marriage is concerned. Cf. Suppl. q. 52 art. 1 ad 4. Notice too, that ST. THOMAS speaks of impotency as making the *person "illegitima"*, not as destroying the object of the consent.

[19]Suppl. q. 52 art. 1 ad 4.

[20]Cf. also In IV Sent. lib. 5 dist. 34 q. unic. art. 2 ad 4; dist. 36 q. unic. art. 1 in corp.

[21]Suppl. q. 50 art. unic. in corp.

[22]Suppl. q. 58 art. 1 ad 1; In IV Sent. lib. 4 dist. 34 q. unic art. 2 ad 1.

The fact that he continually compares impotency to slavery in explaining the impediment[32], and reduces it partially, though not completely, to a form of error[33], and says it is an impediment "ex parte personarum contrahentium"[34], strengthens this impression.

This point remains sufficiently clear in spite of other statements of his[35]. What is sure is this: that ST. THOMAS admitted the possibility of valid marriage among impotent people who knew of their impotency. Hence at least for *them* physical potency is not in the essential object of consent, according to ST. THOMAS.

These citations are not brought forward in order to prove that *impotentia cognita* is not an impediment, nor to imply that we should return to St. Thomas' doctrine on impotency. The doctrine of the Church has been settled by SIXTUS V. But we bring them forward to show that it is one thing to say impotency is a diriment impediment according to the natural law, and quite another to say that physical potency is essential to marriage precisely as the *object* to which consent must be directed. Neither in ST. THOMAS nor in the "Cum Frequenter" do we find that impotency is an impediment *because* the essential object of the contract is lacking[37].

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[32]Suppl. q. 50 art. unic. in corp.; q. 52 art. 1 in corp. and ad 4; q. 58 art. 1 ad 4 etc.

[33]Suppl. q. 52 art. 1 ad 4. Notice in this connection an opinion found in VERMEERSCH-CREUSEN, Epit. II (3rd Edit.) n. 340: if the *cause* of supervenient impotency can be shown to have existed before the marriage there is a chance of having it annulled on grounds of substantial error.

[34]Suppl. q. 50 art. unic. in corp.

[35]For instance the proof that impotency is an impediment, Suppl. q. 58 art 1 in corp.: "Sicut in aliis contractibus non est conveniens obligatio si aliquis se obliget ad hoc quod non potest dare vel facere, ita non est conveniens matrimonio contractus si fiat ab aliquo qui debitum carnale solvere non possit". But since in this passage he is giving a reason why *unknown* impotence is an impediment, and does not apply it to a case of known impotency (cf. the same article ad 4) and since he uses the very same argument to prove that slavery is an impediment (q. 52 art. 1 in corp.) it does not seem to us that he bases his argument on a lack of essential *object*, but rather on a personal incapacity. Besides if such an argument applied to the object of consent, it would prove that *temporary* impotence likewise invalidates,—for the *jus in corpus* granted in marriage must be perpetual. Cf. also Suppl. q. 51 art. 2 ad 6; q. 58 art. 1 ad 1; and In IV Sent. lib. 4 Dist. 34 q. unic. art. 2 ad 1.

[37]Many authors from the time of SIXTUS V have argued from the expository part of his decree in which it is said that eunuchs have no "verum semen". They have based their definition of impotency on that phrase, as if it were part of the decree itself. But the actual answer of the Pope makes no reference to "verum semen". Cf. MAYER, op. cit. p. 404; G. ARENDT, art. cit. p. 86 sq.

In giving our opinion then that there may be another reason for the impediment, although we depart from the explanation commonly given nowadays by theologians and canonists, we are not proposing something so fantastic as to be entirely unworthy of consideration. And we make the departure only because the logic of the case seems to force us to it. On the one hand it is Catholic teaching that antecedent and perpetual impotency is a diriment impediment according to natural law. Therefore physical potency is necessary to marriage *in fieri*. On the other hand it is Catholic teaching that supervenient impotency is not destructive of the marriage bond. Therefore physical potency is not necessary to marriage *in facto esse*. Now to us it seems philosophically untenable that the object of a contract *in fieri* should be anything more or less than the object of the same contract *in facto esse*. What is essential to marriage as a state ought to be essential to it in the making. And what is not essential to it as a state ought not to be essential to it in the making. For as we have remarked frequently, the essential object of consent is the essence of marriage. The essence of consent means saying "yes" to the essence of marriage.

But if impotence were explained as a natural moral incapacity to contract marriage rather than as a deficiency on the part of the object, the difficulty would disappear. For it is clear that as far as the capacity of the parties is concerned, many things can be essential to a contract *in fieri* which are not at all essential to it *in facto esse*,—and can be essential not merely from positive but from the natural law; e.g. the consent itself, or a sane mind. Hence if impotency were explained as a natural incapacity in the contracting party rather than as a deficiency in the object of consent the principle "What is unessential to matrimony *in facto esse* is unessential to the object of the contract *in fieri*" would be absolute and without exception.

Not all difficulties would disappear in this explanation of course. For not to mention the usual canonical explanation of the impediment which is a difficulty in itself, there is always the difficulty of showing why the natural law puts a *diriment* natural incapacity at just this point along the line of possibilities rather than at some other point along the same line. But it is not within the scope of the present study to *prove* that impotency is an impediment from the natural law for moral reasons. We know from the teaching of the Church that it *is* an impediment from natural law, and we merely suggest an explanation of that teaching which harmonizes philosophically with the rest of the teaching on marriage.

Indeed it would be very difficult to prove by unaided reason that the natural law invalidates the marriages of the impotent for moral reasons. But not any more difficult, for instance, than to prove by unaided reason that marriage between father and daughter is *always* invalid, by the law of *nature* for *moral* reasons,—even if they have *no intention of using the marriage right*. There are so many difficulties connected with most of the dictates

of the natural law concerning the use of marriage and especially concerning the impediment of impotency that if we did not have the help of the Church to keep us from going astray we might easily doubt, as learned and well-disposed non-Catholics have doubted, whether some of them are decided by the natural law at all.

Nor is it merely non-Catholics who have had such justifiable doubts. For centuries there were theologians in the Church who did not believe that impotency was always an impediment according to natural law[24]. ST. THOMAS himself was one of them. Even today, though there is no longer doubt about that general principle: "impotency is a natural impediment" yet we do not know for sure *what* impotency is, and *what kind* of impotency is included under that principle. It is not strange then that one can raise a doubt about the *reason* for this impediment. If it is so clear-cut and evident *ex lege naturali* that impotency is an impediment and that the reason for it is a clear defect in the object of consent, why did the Christian world have to wait until 1587 to have the official decision that it was an impediment from the natural law at all? And when the decision came why did it give another reason instead of that clear and plausible one?

We admit then, the difficulty of proving from the natural law without the help of the Church that impotency is always a diriment impediment. But we think this difficulty exists no matter what reason is assigned for the impediment. There is no reason so evident, and overwhelmingly cogent that it is free from all exception.

For instance it may be objected to our explanation of the impediment: If physical potency is not the necessary condition of a *jus in corpus*, then what is the essential object? Must there not be some relation to sexual acts in a marriage bond? But this does not seem philosophically unanswerable. When a person is temporarily impotent, this does not destroy the object of consent. The sexual acts are simply physically impeded *per accidens*. Similarly one could say that in the case of a person who is perpetually impotent, the sexual acts are only *per accidens* physically impeded. For in both cases *per accidens* means simply that contrary to the normal and *per se* propensities of human nature, a person of a given sex, male or female, is physically incapable of exercising the sexual acts proper to his or her sex. The fact that this physical incapacity is temporary or perpetual makes no difference at all as far as the philosophical meaning of the phrase *per accidens* is concerned. For instance whether a person is an infant or an idiot, whether temporarily or perpetually insane makes no difference in the meaning of the phrase *per accidens* when one says of him: he is *per accidens* without the use of reason.

In this conception then the object of the contract of marriage absolutely required would not be the right to the partner's person as *actually* physically capable of the marriage act, but as *per se* fundamentally capable

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[24]Cf. for example PONTIUS lib. 8 c. 11 n. 9. etc.

of that act. And of course a person is *per se* physically capable of performing the sexual acts proper to his sex, merely from the very fact that he belongs to that sex. This conception of the essential object then would not eliminate the sexual aspect of the object so that one could entertain the absurd notion of marriage between two persons of the same sex, but it would simply reduce the concept of the object to a minimum. And why? Always for the same reason. *De facto* people are still married when impotency supervenes. *De facto* there still exists between them a marriage bond which is essentially a sexual relationship. *De facto* in those circumstances there still exists a fundamental *jus in corpus*.

It is our opinion therefore, that as far as the object of consent is concerned physical potency is not essential to marriage *in fieri* any more than it is to the object of marriage *in facto esse*. But the lack of it is a defect which from the natural law incapacitates the consent of the contracting parties subjectively. Therefore, the principia that the essence of marriage and object of consent are the same in marriage *in fieri* and *in facto esse*, and that whatever is essential to the one is essential to the other, and vice versa, is a universal principle without exception.

CHAPTER IX.

THE ARGUMENT FROM PRE-MARITAL AGREEMENTS

Since in the present chapter we will make use of an argument which involves the notions of consent and intention we must begin by explaining these terms.

For practical purposes, and for the requirements of the present study, consent to marriage, and intention to marry (here and now) amount to the same thing. Psychologists distinguish the two acts along with others that the will elicits[1], but for our purposes the distinction is not necessary. The word intention more generally perhaps than the word consent, regards an *end* to be obtained in the future[2]. One intends now to *do* something later on. The word consent on the other hand is more often used to indicate the present complacence of the will in something which the intellect proposes as a *means* to an end[3]. But in the case of marriage the consent *is* the intention to make the marriage here and now; it is the "voluntas efficax faciendi matrimonium". What is said of intention to marry, and intention against the substance of marriage, therefore, can be applied for the most part to marriage consent also. By consent to marriage, and intention to marry, then, we mean the act of the will by which the partners accept or make the marriage here and now. And we reiterate what we have insisted on hitherto. To consent to marriage, or to intend marriage merely means to say "yes" to marriage. The essential thing in consent and intention is to say "yes" to whatever is essential in marriage[4].

An intention looked at subjectively, that is, as an elicited act of the will, may be considered as actual, virtual, habitual, etc. For our purposes we need consider only an actual intention to marry here and now; and an actual consent given to marriage.

An intention looked at objectively may be either implicit or explicit. That is to say the object to which the intention is referred may be either implicitly or explicitly present to the mind. For the will cannot intend

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[1]And compare VERMEERSCH Mor. Theol. I, n. 39.

[2]LERCHER IV, n. 246 defines intention as "voluntas efficax obtinendi finem."

[3]BRANCATUS disp. 17 art. 9 n. 150: ". . . . . ex dictis de actibus humanis consentire est cum alio sentire eo quod intellectu proponente quid agendum sit voluntas sibi complacet et vult".

[4]Cf. above Intro. p. 10; CONINCK disp. 24 dub. 4 n. 39: "Requiritur secundo (ad essentiam,) consensus in ea quae ipsius essentiam necessario consequuntur; quia qui rem aliquam vult, necessario vult saltem implicite ea quae ipsi necessario connexa sunt. Alius autem quivis consensus vel dissensus aut intentio quae dictis non repugnat, est ad matrimonii valorem impertinens".

anything, any object, except inasmuch as the intellect presents that object to be embraced. The will itself is blind. Hence when the intellect presents an explicit object and the will embraces it, such an intending of the object is said to be explicit. When, along with the explicit object of intention, the intellect proposes to the will another one, which is necessarily implied or connected with the first, but which is not distinctly adverted to, the will's embrace of that second object is called an implicit intention. For instance, a man intends to make a contract to put up a building. This necessarily connotes various obligations, the principal and explicit one of which is to put up the building. This, therefore he intends explicitly. But the other obligations necessarily implied in such a contract, he may or may not actually advert to (may not even be able to advert to explicitly, since they may depend on unforeseen circumstances); his intention of these other *implied* obligations is an implicit intention. Their connection with the explicit object of intention must be of such a nature that consent to the explicit object, in the absence of other stipulations, can only mean consent to the implied objects. Every act of intention therefore has some explicit object and when an intention with regard to a thing is implicit it always presupposes that there is also some explicit object of consent which implies this other object. The same thing holds for consent. BRANCATUS says[5]: "No act of willing is called consent unless it tends *explicitly* in some object explicitly proposed to it by the intellect". But of course when that explicit object necessarily implies some further object, there can be implicit consent to the latter[6].

These distinctions are necessary, for in the literature of matrimony from the time of PETER LOMBARD they occur continually in the discussion of the question: Is it necessary, in order to contract marriage, to intend or consent to the copula? The origin of the question was the discussion of Our Lady's marriage[7]. And this question evidently has a close connection with our own[8]. For as an objection against our position it is urged, that where there is a condition of preserving virginity there is no consent to the copula, and even none to the obligation of the copula. Therefore there is no marriage. And on the other hand, retorting this objection, we can make an argument *ad hominem* against our adversaries. For all of them admit that marriage made with a vow of virginity is valid, and many say that it is valid if the agreement to preserve virginity is a mode and not a

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[5]Cf. note 3.

[6]"Tacit" and "express" intention and consent amount to the same thing as implicit and explicit in the present connection. Other divisions of intention and consent looked at objectively e.g. internal, external reflex, direct, etc. are not pertinent to the present inquiry. Cf. LERCHER IV, n. 250.

[7]IV Sent. lib. 4 dist. 28 c. 3; P.L. 162-915.

[8]BRANCATUS disp. 12 art. 8 n. 102.

strict condition. What follows, will be at once a refutation of the objection and an explanation of this argument.

Everyone is agreed that consent to marriage is a consent to something which is essentially related to copula. We have already shown that marriage is essentially related to its three ends and in the case of *proles* this relation is the radical right to the copula by means of which *proles* is realized. It is true that LIBERIUS held a different opinion. He said[9]: ". . . . . essentia coniugii salvatur absque ullo prorsus respectu et consensu ad thorum". But this opinion is justly rejected by the unanimous chorus of the schools.[10] For marriage is essentially a sexual relationship and if it could exist without any relation at all to copula, it could exist without its primary end, which is absurd. Besides, unless this sexual element were essential two sisters could marry[11]. Even the oft-cited passage from I Cor. VII, 4 ("The wife hath not power of her own body" etc.), can be appealed to, to show that the marriage bond is essentially related to the marriage act[12]. It is a point which cannot be seriously disputed.

But does this mean that when one consents to marriage, one necessarily consents at least implicitly to the copula? Many authors have said so[13], following ST. THOMAS[14]: "To consent to marriage is to consent implicitly to the carnal copula". Others distinguish with SANCHEZ[15], a consent to copula which is implicit *ex parte contractus*, not *ex parte contrahentium*. In other words they say that consent must be given to something which is of its nature related to copula[16]. This is perfectly true but the choice of terminology is unhappy. For the words implicit and explicit

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[9]De Matr. disp. 6 controv. 10 n. 170, 171.

[10]E.g. MASTRIUS In IV Sent. lib. 4 disp. 7 q. 1 art. 1 n. 3 and n. 8; MARTIN PEREZ disp. 13 sect. 4 n. 5; DE DICASTILLO disp. 2 dub. 3 n. 17; SOTUS in IV Sent. lib. 4 dist. 29 q. 2 art. 3; SANCHEZ lib. 2 disp. 29 n. 4; PONTIUS, lib. 1 c. 17 n. 7; S. ALPHONSUS IV, De Matr. n. 879; LÉPICIER De S. Jos. pars 1 art. 4 n. 16; De Matr. q. 5 art. 4 n. 4; and see also other citations Chap. II note 2 and Chap. VIII p. 123.

[11]KNECHT p. 591 note; VERMEERSCH Theol. Mor. IV, n. 42.

[12]MARC-GESTERMANN II, n. 1963. And Cf. above Chap. VII Note 26.

[13]BRANCATUS disp. 12 art. 8 n. 110, 124, 125, 126, 127; COVARRUVIAS tom. 1 De Matr. pars 2 c. 8 paragr. 1 n. 5; SCHMALZGR. lib. 4 pars 1 tit. 1 n. 261 sq; GONZALEZ-TELLEZ lib. 4 tit. 5 c. 7 n. 8 ad fin; PIRHING lib. 4 tit. 1 sect. 3 paragr. 1 n. 69; BILLUART tom. 10 De Matr. Diss. 8 art. 5; PALMIERI thes. 1 n. VIII.

[14]Suppl. q. 48 art. 1; and compare III, q. 29 art. 2 in corp. (The Blessed Mother did not consent *"expresse* in copulam carnalem. . . " etc.) Compare also Suppl. q. 49 art. 3 in corp. where he says that the *intentio prolis* is of the essence of marriage.

[15]SANCHEZ lib. 2 disp. 28 n. 4.

[16]For example MASTRIUS In IV Sent. lib. 4 disp. 7 q. 3 art. 3 n. 106, 107; PALMIERI thes. 3 n. VI.

when used of consent should be applied only to the object which is proposed to the will for consent. In other words a consent if said to be implicit at all must be implicit *ex parte contractus* and not *ex parte contrahentium*. MARTIN PEREZ is justified then, in disagreeing completely with such a distinction[17]. BILLUART says that the intention of copula which is essentially required is an "intentio implicita *inefficax*" which can stand along with an efficacious intention to exclude copula[18]. LIBERIUS has a still more intricate explanation in which he distinguishes the possible copula from its futurition[19].

But it would seem that all these authors when they speak of an implicit consent to the copula, mean nothing more than a consent to the *potestas copulae*, or a consent to a marriage bond which is essentially related to copula. Thus ST. THOMAS after saying "that to consent to marriage is to consent implicitly to the carnal copula" adds immediately, "as the effect is implicitly contained in its cause, for the *faculty* of carnal copula to which consent is given, is the cause of the carnal copula, just as the faculty of using what is one's own is the cause of the use"[20]. And so, many other authors, when they come to explain this "implicit consent" to copula[21], or the implicit consent of the Blessed Mother[22], show that they mean nothing more than consent to a bond or obligation which is essentially related to copula. Perhaps all of them would agree with DE DICASTILLO in saying merely that the consent should be referred to the copula "aliqua ratione", and that "fieri non potest quin *respectus* ad copulam *involvatur*".[23]

Consequently we have no quarrel with the *doctrine* of these authors if this is all they mean. But to us, such a use of the terms "implicit consent to copula" and "implicit intention of copula" seems an error. It is true of course, that in the ordinary marriage where the parties really intend at least implicitly to make use of their marriage right, their consent to marriage is at least an implicit consent to the copula. But the distinctions cited above, and the explanations given there, were excogitated chiefly with a view to explaining marriages in which the parties actually and explicitly intended to *exclude* the copula,—above all to explain the consent of the *Blessed Virgin*. Now to us it seems contrary to common sense and even an abuse of scholastic language to say that a person has an implicit intention

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[17]Disp. 18 sect. 5 n. 8.

[18]Tom. 10 De Matr. diss. 3 art. 5. obj. 2.

[19]Disp. 6 controv. 10 n. 168.

[20]Suppl. q. 48 art. 1.

[21]Compare notes 15 to 19.

[22]BRANCATUS disp. 12 art. 8 n. 124; ST. BONAVENTURE In IV Sent. lib. 4 dist. 28 art. unic. q. 6; CASTRAPALAO disp. 2 punct. 1 n. 3; LAYMANN Theol. Mor. lib. 5 tr. 10 pars 2 c. 2.

[23]DE DICASTILLO disp. 2 dub. 5 n. 27.

of a thing which explicitly he not only does not intend but positively rejects. And when a person marries with a vow of chastity intending to keep his vow, he explicitly rejects copula. His will does not embrace it at all, either as a means or an end, either implicitly or otherwise.

Hence we agree with those authors who say that *no* consent to copula is essential in marriage. For instance LANCELOTTO says that the marriage of the Blessed Virgin was a true one "although the Blessed Virgin consented to copula *not at all*"[24]. MARTIN PEREZ says that consent to the copula is *in no wise* necessary[25]. Likewise KRIMER[26]: "It follows that marriage can be celebrated without consent to the copula"; and again[27]: "*All* consent to the copula is excluded" (in certain cases). Similarly DE DICASTILLO[28] and CONINCK[29]. And SUAREZ, although he says that the Blessed Virgin consented to copula *in radice* and *in causa* adds[30]: "but to will thus *in radice* is not properly speaking to will and most of all when one by a contrary act of the will proposes to avoid the [marriage] act".

The reasons for this doctrine are simple and convincing: First, it is psychologically impossible to consent and not consent to the same thing at the same time. Therefore when the contracting parties explicitly reject copula (as in the case of the Blessed Virgin's marriage, and other virginal marriages), they cannot implicitly consent to it or intend it at the same time. The explicit rejection is stronger, and destroys any implicit consent which would otherwise be present. Secondly, since copula is not essential to marriage, marriage consent need not necessarily include copula. For the essence of consent is the acceptance of those things only which are essential to marriage.

But SANCHEZ objects[31]: "Consent to a thing tends at least implicitly in the effect to which that thing is intrinsically ordered". Hence consent to the *potestas copulae* is at least an implicit consent to the copula itself. This argument might hold if we were talking of physical cause and effect, or of a cause which necessarily had to produce a given effect, but in the

[24]LANCELOTTO tom. 2 tr. 9 paragr. 14 glossa n.

[25]Disp. 13 sect. 5 n. 7.

[26]KRIMER IV, n. 363.

[27]KRIMER IV, n. 798.

[28]DE DICASTILLO disp. 2 dubit. 5 n. 28.

[29]CONINCK, disp. 24 dub. 4 n. 42; and AVERSA q. 3 sect. 3.

[30]SUAREZ De Incarn. pars 2 disp. 7 sect. 1 ad fin. G. AREND, "De genuina ratione imped. impot." in: Ephem. Theol. Lov. 9 (1932) p. 30 II sq. and p. 50 III sq. shows that no intention of *generation* is necessary for valid consent. PICHLER lib. 4 tit. 1 n. 79 prob. 4 shows that a marriage of a dying person is valid although "in tali matrimonio excluditur copula perpetuo et quidem ita ut naturaliter haberi nequeat".

[31]SANCHEZ De Matr. lib. 2 disp. 28 n. 3;—but he seems to mean no more by it than SUAREZ (cf. note 30) whom he quotes loc. cit. n. 4.

present instance we are dealing with a *moral power* which though intrinsically ordered to a given act, does not necessarily imply the realization of that act. Furthermore, it is only in a very tenuous and farfetched sense that a *right* to a certain act can be called a *cause* of that act at all. Hence we agree with DE DICASTILLO[32]: "Verum enimvero quia copula ipsa *non est proprie effectus* praedictae traditionis et obligationis in quas necessario debet directe ferri consensus sed tantum est purum objectum aut extremum quod respiciunt, hinc est ut quamvis consensus debeat directe ferri in praedictam dominii corporum traditionem et obligationem non sequatur quod affectus debeat implicite ferri in copulam sed solum quod copula debeat connotari indirecte et in obliquo; quia id quod tantum est purum objectum aut purum extremum et non effectus non involvitur et continetur in eo cujus tantum est objectum et extremum"[33].

In explaining implicit intention or consent above we said: "When, along with the explicit object of intention the intellect proposes to the will another one which is necessarily implied or connoted, or connected with the first, but which is not distinctly adverted to, the will's embrace of that second object is called an implicit intention". It is clear then that in marriage consent copula is not necessarily *proposed to the will* implicitly as an object to be embraced. It is connoted by the explicit object of consent, but in those cases where it is explicitly rejected it is by no means connoted in such a way that the will cannot embrace the explicit object of consent—the marriage—without also implicitly accepting copula. We conclude that marriage consent is not necessarily an implicit consent to copula in any true sense.

But one may urge the objection: at least marriage consent must be a consent to the right and obligation to the copula. For canon 1081 § 2 reads: "Consensus matrimonialis est actus voluntatis quo utraque pars tradit et acceptat *ius in corpus* perpetuum et exclusivum, in ordine ad actus per se aptos ad prolis generationem". And a marriage entered into with a condition to preserve virginity excludes the obligation of copula. Therefore the consent is essentially deficient.

In reply: the right and obligation to copula which are essential to marriage are, as we have proved in the first part of this essay the *radical* right and the *radical* obligation. The *ius in corpus* of canon 1081 § 2 is compossible with an obligation not to make use of the copula. The proximate right and obligation to copula are not essential to marriage. Hence consent to them is not an essential part of consent[34].

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[32] DE DICASTILLO disp. 2 dubit. 5 n. 28.

[33] For similar argumentation see KRIMER IV. n. 803; MARTIN PEREZ disp. 13 sect. 5 n. 7; BILLUART. tom. 10 diss. 3 art. 5.

[34] Many authors say explicitly that the essential consent is to a merely "radicalis et antitudinalis obligatio ad copulam", and that only in this sense did the Blessed Virgin consent. Cf. SUAREZ De Incarn. pars 2 disp. 7 sect. 1 ad fin.; REBELLUS pars. 2 lib. 2 q. 13 sect. 5 n. 42; MARTIN PEREZ disp. 13 sect. 5 n. 5 and 7.

Finally one may ask: Must the consent to the radical obligation of copula be explicit or will merely an implicit consent suffice? The explicit object of consent, the thing to which the parties must actually advert is merely the marriage[35]. It is not necessary that they *actually* think of any of its obligations. They must know with habitual knowledge at least, that marriage is a permanent society between man and women for the procreation of children[36]. But frequently the consent to the obligations of marriage is more or less implicit. They are not actually adverted to at the moment of consent. It is sufficient therefore in marriage as in other contracts that one consent *implicitly* to the obligations imposed by it[37].

Having clarified these ideas of intention and consent we can present the argument drawn from pre-marital agreements.

If the *intention* not to have the proximate right and obligation to copula does not invalidate marriage consent, then a *condition* which excludes that proximate right and obligation, namely a condition to preserve virginity, does not invalidate. Atqui. Ergo.

The Major. For conditions against the substance and intentions against the substance are on a par as far as their power of invalideting marriage is concerned. Canon 1086 says that intentions against the substance invalidate. Canon 1092 says that conditions against the substance invalidate. But when we look to the *reason* why both intentions and conditions of this kind invalidate it is always the same[38]. It is because there is a lack of consent to the essential object of the contract. It is because there is a contradiction of the essential content of consent, which prevents that consent from reaching its essential object. In both cases the parties try to will and not will marriage at the same time. The fact that an intention against the substance is not a mere partial simulation but over and above that is made a *condition* of the consent, does not add one whit to its power of invalidating. There is no secret strength in the phrase *deductum in pactum* or in the word *condition*. A condition merely makes it clearer than it might otherwise be that the prevailing intention of the party is *not* to marry *unless* the condition is fulfilled. But the formality under which this prevailing intention is made to accompany the attempted celebration of the contract does not make it any more repugnant to the essence of the consent than a simple intention, positive, express, and prevailing against the substance[39]. Accordingly, since intentions and conditions against the

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[35]BRANCATUS De Matr. disp. 17 art. 9 n. 149.

[36]Can. 1082 § 1.

[37]It is another question whether one who has no knowledge whatever of the copula can consent validly. Can one be said to consent implicitly to a thing to which he not only does not advert, but of which he is absolutely ignorant? We offer no opinion on this difficult question.

[38]Cf. above Chap. VI, p. 94.

[39]Cf. above Chap. VI p. 95.

substance are on a par in this particular note of *being-against-the-substance*, then if a given express and prevailing intention is not against the substance and does not invalidate, the same intention in conditional form is not against the substance and does not invalidate.

The Minor; scil. : the intention not to have the proximate right and obligation to copula does not invalidate marriage consent; for:—

1) *Ad hominem.* Many of the authors who say that the condition to preserve virginity invalidates marriage admit that a *modal* agreement does not invalidate[40]. And others say that it is *certain* that a modal agreement to preserve virginity does not invalidate[41]. Now such an agreement involves an intention, express and positive, by which the proximate right and obligation to copula are excluded. And as we saw above, this intention, being more precise and determinate than the mere general intention to marry, must be considered in practice the prevailing intention[42]. Now since, according to these authors such an intention is not invalidating as excluding an essential element from the object of consent, they should admit that the condition is likewise not invalidating, and does not exclude an essential element of consent.

2) *In general.* All authors admit that the marriage of the Blessed Virgin was a true marriage, and that nevertheless she entered it with an obligation not to have intercourse; that is, it is common doctrine that the Blessed Virgin had a vow of chastity when she married St. Joseph[43]. Furthermore, independently of this doctrine, all are agreed that persons with vows of chastity, who intend to keep their vows, can enter marriage validly[44]. Now the proximate right and obligation to intercourse are incompatible with an actual obligation not to have intercourse. One cannot be actually obliged to do an act and obliged to omit that act at the same time. Hence when people marry with vows with an explicit intention to preserve their vow they exclude explicitly the actual or proximate right and obligation to the copula. And since marriage in such a case is admitted by all to be valid, it follows that an intention, positive, express, and pre-

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[40]E.g. WERNZ, Jus Decretalium IV, n. 302 note 41; KNECHT p. 591 note; BILLOT De Sacr. II, p. 341; DE SMET n. 156; LANCELOTTO tom. 2 tr. 9 paragr. 13 glossa k; CHELODI n. 125; etc.

[41]E.g. HUARTE n. 164; TIMLIN p. 320; WERNZ, Jus Decretalium IV. n. 302 note 41.

[42]Cf. above Chap. VI p. 95.

[43]Cf. above Introduction p. 5 and note 18. In the supposition that the condition to preserve chastity is not invalidating it is very easy to explain how the Blessed Mother contracted marriage without the least prejudice to her most perfect virginity. And for this reason too, the conclusion at which we have arrived recommends itself.

[44]E.g. VASQUEZ disp. 125 c. 6 n. 64, 65; KRIMER IV, n. 812. HEISS n. 94; ROSSET I, n. 192; VAN DE BURGT pars 2 paragr. 3 n. 71; etc. All are agreed on this point—even those who deny our thesis.

vailing, to exclude the proximate right and obligation to copula, is not necessarily invalidating, is not necessarily an intention against the substance. Therefore a similar condition is not invalidating[45].

One may object that there is no parity here, because the condition obliges the parties *in justice* to omit the copula, whereas the vow binds from religion. One cannot understand how a right and obligation in justice to abstain could be compatible with an obligation in justice to grant the copula. But one can understand that a right and obligation in justice to the copula might still be ligated *aliunde* i.e. by the virtue of religion. But this objection is specious. The two cases are parallel in the point from which the argument is drawn. For an obligation is an obligation no matter what its source. And since we are speaking only of the proximate right and obligation to copula it is impossible to distinguish and say: There is a proximate obligation in justice to the copula, but a proximate obligation from religion not to have copula. For a proximate right and obligation means an actual, present, unimpeded right and obligation, and as we have just remarked, one cannot be obliged to posit and to omit the same act at the same time. But if our adversaries say that they distinguish in the case of these marriages with vows, the actual obligation of the vow to *abstain*, from the radical obligation in justice to *make use* of marriage, then they give their case away. For thus they admit that the proximate right and obligation are not necessary elements in the object of consent, and that marriage consent is compatible with an intention to exclude the proximate right and obligation to intercourse[46].

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[45]BILLOT, De Sacr. II, p. 341 objects that the case of a strict condition or of an *intrinsic* pact is different from a mere *added* agreement, because ". . . . . impossible est ut causa translativa dominii, ipsissima causa sit qua aufertur naturalis et spontanea dominii consequentia, scilicit libera utendi facultas". But we reply: Impossible est ut sit causa cur auferatur *essentialis* aliqua consequentia, Concedo;—consequentia naturalis quidem et spontanea sed non essentialis, Subdistinguo;—si non datur pactum inter partes ita auferens istam liberam facultatem utendi, Concedo;—si datur tale pactum, NEGO. Cf. HUARTE n. 173; and compare KRIMER IV, n. 805: the condition "non impedit efficacem *translationem dominii* in corpus ad copulam."

[46]One should not argue immediately from the fact that marriage with a condition of virginity is valid, to the conclusion: therefore such marriage is licit. Our opinion with regard to the lawfulness of such marriage is briefly as follows: Although we have no hesitation in asserting that the thesis is proved and that such marriage is valid, yet one cannot neglect the large body of canonical opinion which has held and holds such marriage to be invalid. The opinion has extrinsic weight and the authority of great names. Now in the supposition that the marriage is only probably valid some might argue against its lawfulness on the score that in attempting it one exposes the sacrament to the danger of nullity. And yet even in this supposition we still think it would not be for *that* reason alone illicit to attempt it. For there are cases when one may expose the sacrament of matrimony

We conclude therefore that since the intention to exclude the proximate right and obligation to copula does not invalidate therefore the condition of preserving virginity does not invalidate[47].

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to the danger of nullity for sufficient reason—for example in a case of doubtful impotency. To attempt a doubtfully valid virginal marriage could therefore be licit in some circumstances as far as this point is concerned. But we think that such marriages whether certainly or only probably valid, are *per se* illicit on other grounds. It is wrong for people to bind themselves by bonds of marriage and bonds of chastity at the same time, because the intimacies of married life are extremely likely to lead to difficulties, temptations and sin. This is the principal reason against such marriages, and experience confirms it. Just as a person with a simple vow of chastity is forbidden, because of these dangers, to enter matrimony even if he intends to keep his vow, so also we think practical morality forbids in ordinary circumstances the contracting of virginal marriage. If the agreement is revocable at the will of either party this difficulty is not present; but if the partners wish to make a strictly contractual agreement, as in the supposition of the thesis, a confessor who knew of such an intention should forbid it. One may object: therefore it is illicit for people to make such agreements even after marriage,—for the same reason holds. Our answer is that such agreements even after marriage may easily be illicit and for the same reason; and they should not be made except in cases where the partners *know from experience* that they are capable of living up to them. On the other hand both before and after marriage there can occur exceptional cases in which these practical dangers are absent. In such cases, (for instance some of the cases of holy persons mentioned in the Introduction, above) the agreement is both allowable and praiseworthy. On the lawfulness of virginal marriage cf.: LINNEBORN paragr. 41 n. IV (note 5 p. 336); ROSSET, l. n. 199; SCHÄFER, part. 4 c. 2 n. 4 p. 243; etc. These authors all say the marriage is illicit but they generally argue from its probable nullity. Cf. however NILLES, p. 764 for the question of danger to chastity. One must keep in mind also that to contract marriage with *any* condition is a matter of such importance and fraught with such possibilities of future legal tangles that it should not be attempted without the consent of ecclesiastical authority. And although this is said more especially of suspensory conditions, yet it applies to all. The condition should be just as public and provable as the consent itself. It is never permissible for the partners to attach conditions privately to their consent.

[47]Others make use of this argument in a similar way but not always with precision of terms. E.g. KRIMER IV, n. 812, 813. VASQUEZ disp. 125 c. 6 n. 64, 65; PESCH VII, n. 752; PONTIUS lib. 3 c. 11 n. 7; MASTRIUS In IV Sent. lib. 4 disp. 7 q. 3 art. 3 n. 104, 105, 107; LIBERIUS disp. 6 controv. 10 n. 166; HIQUAEUS, In IV Sent. lib. 4 dist. 31 q. unic. n. 55; etc.

CONCLUSION

In the present essay we have compared the condition of preserving virginity, accurately defined, with the essence of marriage, likewise accurately defined, and have found that the two are not contradictory. Having defended this position against whatever worth-while objections we could find in the literature, and having confirmed it by the argumenta drawn from universally admitted doctrine with regard to pre-marital and post-marital agreements, we consider that the conclusion is justified: A marriage contracted with a condition to preserve virginity forever can be a true marriage.

APPENDIX

OPINIONS OF AUTHORS

In the literature concerning virginal marriage one occasionally meets such statements as: "The majority of authors deny it"; or: "The majority of theologians defend it, while the majority of canonists deny it"; or: "The moralists defend it against the canonists;" etc. Such generalizations are usually not justified, and in any case have not much point. For although the following list of opinions is far from complete and contains only those authors whom we were able to consult and who offered an opinion on the subject, yet it is sufficiently comprehensive to indicate that for *many* centuries and among *all* classes of writers there has been a division of opinion. We arrange these authors in three groups: first, those who favor the validity of virginal marriage, second, those who deny or are inclined to deny it. We say "favor" and "inclined to deny" because it is not possible to assert that all of them actually defend or reject the opinion exactly as limited and defined in Chapter VI. Frequently they leave somewhat in doubt the precise *status questionis*. When the opinion of an author is notably doubtful we will indicate it. And thirdly we will add a note on the opinion of ST. THOMAS, ST. BONAVENTURE and SCOTUS.

NOTE For the full title of works cited, consult the Bibliography, p. i sq.

I. AUTHORS WHO FAVOR the validity of virginal marriage.

AERTNYS-DAMEN II, n. 827 (ut videtur).
AMORT De Matr. paragr. 2 q. 8.
ARREGUI n. 788.
AVERSA De Matr. q. 3 sect. 3.

BALLERINI-PALMIERI VI, n. 231 note a.
BECANUS De Incarn. c. 28 q. 5.
BELLUTUS disp. 16 q. 2 n. 75, 78 (ut videtur).
BERARDI V, n. 1057 (ut videtur).
BILLUART tom. 10 De Matr. diss. 3 art. 5.
BONACINA De Matr. q. 2 punct. 10 n. 13.
BRANCATUS disp. 20 art. 1 n. 12, 13.
BUCCERONI IV, De Matr II n. 967.
BULOT II, n. 751.
BUSEMBAUM lib. 6 tr. 6 De Matr. c. 2 dub. 1 resolv. 1.

CARAMUEL lib. 2 fundamentum 51 paragr. 3 (ut videtur).
CASTRAPALAO disp. 2 punct. 11 paragr. 4 n. 6.

CATHREIN n. 531 (ut videtur).
CLERICATUS Decis. 20 n. 21.
CONINCK disp. 24 dub. 4 n. 38.

DE DICASTILLO disp. 5 dub. 12 n. 154.
DE LUCA lib. 4 tit. 5 paragr. 6 n. 311 ("modo conditio in pactum expresse non deducatur").

GENICOT-SALSMANS II, n. 459 ad fin. (ut videtur).

FARRUGIA n. 84.
FERRERES II, n. 1061.
FLUNK p. 660, 661.

GASPARRI n. 903 (Edit. 1932).
GENICOT-SALSMANS II, n. 459 ad fin. (ut videtur).
GOBAT tr. 10 n. 397 and 466.
GURY-BALLERINI II, n. 564 note 6.

HEINER p. 86.
HIQUAEUS In IV Sent. lib. 4 dist. 31 q. unic. n. 53 sq.
HOLZMANN tr. 2 De Matr. disp. 2 c. 2 art. 2 paragr. 3 n. 337.
HUARTE n. 166.
HUTH tit. 1 sect. 2 paragr. 1 (p. 103).

KENRICK tr. 21 De Matr. c. 2 paragr. 1 n. 36 (ut videtur).
KRIMER IV, n. 312, 313.

LACROIX lib. 6 pars 3 De Matr. q. 34 paragr. 4 n. 242.
LAURENTIUS n. 758.
LEHMKUHL II, n. 882.
LÉPICIER De Matr. q. 5 art. 4 n. 6.
LERCHER IV, n. 524.
LEURENIUS lib. 4 tit. 5 q. 174 n. 2.
LIBERIUS De Matr. disp. 6 controv. 10.
LIGUORI, S. ALPHONSUS IV De Matr. n. 881 (ut videtur).

MARC-GESTERMANN II, 1973.
MASTRIUS In IV Sent. lib. 4 disp. 7 q. 3 art. 6 n. 107.
MERKELBACH III, n. 774 ad fin. (ut videtur).

NILLES p. 768 (ut videtur).
NOLDIN Zeitchrift für Kath. Theol. XXVII (1903) p. 718 sq.
NOLDIN-SCHMITT III, n. 631.

OJETTI Synopsis etc. I, n. 1435.

PALMIERI De Matr. thes. 3 n. VI.
PEREZ, MARTIN disp. 13 sect. 6.
PESCH VII, n. 752.
PICHLER lib. 4 tit. 1 n. 79.

PICO n. 560, 561 (ut videtur).
PISCETTA-GENNARO VI, n. 125.
PONTIUS, BASILIUS lib. 8 c. 11 n. 6 sq.
PRÜMMER III, n. 664.

REBELLUS pars. 2 lib. 2 q. 10 sect. 8 n. 19 and q. 18 sect. 4 n. 31 sq.
RETT p. 590 sq.
REUTLINGER pars 2 sect. 1 paragr. 2 q. 2 n. 9.

SASSE II, tr. De Matr. sect. 1 art. 1 n. V (ut videtur).
SCHÄFER part 4 c. 2 n. 4 p. 243.
SCHMIER lib. 4 tr. 2 c. 2 n. 118 sq.
SUAREZ De Incarn. pars 2 disp. 7 sect. 1 post mediam.

TAMBURINI De Matr. tr. 4 c. 5 paragr. 3 n. 5.
TERRIEN tom. 2 part 1 p. 187 note 1.
TIMLIN p. 311 sq.
TOSTATUS In Lib. Numerorum, c. 30 q. 32 (ut videtur).
TOURNELY De Matr. c. 1 n. 33.

VASQUEZ disp. 125 c. 6 n. 63.
VERMEERSCH Theol. Mor III, n. 795, 2 ad fin.
VIVA pars 7 De Sacr. Matr. q. 4 art. 6 n. VI.

WALDENSIS De Sacr. tom. 2 c. 130 and 131 n. 1.
WERNZ-VIDAL V, n. 521 and note 46 ad fin.
WIRCEBURGENSES tom. V De Matr. n. 270.

ZALLINGER lib. 4 tit. 5 paragr. 98 (ut videtur).

2. AUTHORS WHO DENY the validity of virginal marriage.

AICHNER paragr. 169 note 2.

BARBOSA tom. 2 in lib. 4 Decret. tit. 5 n. 3.
BASSAEUS sub. verb. Matrimonium VI, n. 4.
BENEDICT XIV De Syn. Dioc. lib 13 c. 22 n. 12. Benedict does not decide the question either way but evidently favors the negative.
BILLOT De Sacr. II, p. 341.
BLAT De Rebus pars 1 tit. 7 De Matr. n. 492.

CAPPELLO De Matr. n. 636.
CAPREOLUS In IV Sent. lib. 4 dist. 30 q. unic. art. 3 contra 3am conclus. ad 5um.
CHELODI n. 125.
COVARRUVIAS pars 2 De Matr. c. 3 paragr. 1 n. 3.

D'ANNIBALE III, n. 443 note 4 .
DE SMET n. 155.

ENGEL lib. 4 tit. 5 n. 10.
ESTIUS In IV Sent. lib. 4 dist. 26 paragr. 8.

FILLIUCIUS tr. 10 c. 4 n. 150.

GONZALEZ-TELLEZ lib. 4 tit. 5 c. 7.
GOTTI tom. 15 De Matr. q. 3 dub. 5 paragr. 2 n. 9.
GUTIERREZ De Matr. c. 46 n. 6 (ut videtur).

HEISS p. 94.
HENRIQUEZ lib. 11 c. 4.
HUSSAREK, MAX VON, Die Bedingte Eheschliessung (Wien 1892) p. 233 (cited by Timlin p. 312).

JOYCE p. 70 (ut videtur).

KNECHT p. 591 note.
KÖNIG lib. 4 tit. 1 pars 2 paragr. 7 n. 102.
KREUTZWALD in Kirchenlexikon VI, col. 1876.

LAYMANN lib. 5 tr. 10 paragr. 2 c. 7 n. 9.
LE BRAS in Dict. de Théol. Cath. XVIII, col. 2296.
LEITNER p. 135.
LINDNER article: Josephsehe in Lexik. für Theol. und Kirche V.
LINNEBORN paragr. 41 n. IV (p. 336).

NAVARRUS lib. 3 De Voto, Consil. 11 n. 2 and 3.

PAYEN II, n. 1784 (ut videtur).
PIRHING lib. 4 tit. 1 sect. 3 paragr. 1 n. 69 and tit. 5 par. 3 n. 13.
PITONIUS tom. 3 discept. 58.

RONCAGLIA tr. 21 De Matr. q. 2 c. 2 quaer. 5 resp. 4.
ROSSET I, n. 194 sq.

SALMANTICENSES (Curs. Theol. Mor.) tom. 2 tr. 9 De Matr. c. 7 dub. 3 n. 95.
SANCHEZ lib. 5 disp. 10.
SANTI lib. 4 tit. 5 n. 21.
VON SCHERER II, p. 187 note 102.
SCHIAPPOLI n. 167.
SCHMALZGRUEBER lib. 4 pars 2 tit. 5 n. 120.
SCHULTE Handbuch, p. 142.
SOTO In IV Sent. lib. 4 dist. 29 q. 2 art. 3.
SPORER De Matr. c. 1, sect. 3 n. 344.
STRUGGL tr. 12 q. 2 art. 3 n. 33.

TANNER tom. 4 disp. 3 De Matr. q. 3 dub. 4 n. 74.
TRIEBS c. 6 paragr. 63 p. 534, 535.

URACH II. n. 2681.

VALERIUS REGINALDUS tom 2. lib. 31 c. 3 n. 22.
VAN DE BURGT pars 2 paragr. 3 n. 71.
VLAMING II, n. 546.

WERNZ Jus Decret. IV, n. 302 note 41.
WIESTNER lib. 4 tit. 5 n. 49 sq.
WIGANDT. tr. 16 Examen 4 n. XLIV ad 3um.

3. THE OPINION of ST. THOMAS, ST. BONAVENTURE and SCOTUS.

The opinion of ST. THOMAS is not clear. When speaking of the marriage of Our Blessed Lady he explains it in such a way that one could conclude from his principles that marriage even with a strict condition of virginity is not impossible. Cf. III, q. 29 art. 2; Suppl. q. 42 art. 4; q. 48 art. 1; In IV Sent. lib. 4 dist. 30 q. 2 art. 2. But in Suppl. q. 48 art. 1 ad 8 he holds that if a woman makes the condition "Consentio in te dum tamen non cognoscas me", the marriage is invalid because such an explicit condition "non solum actui sed etiam potestati contrariatur copulae carnalis". Nevertheless many authors interpret this, in the light of his principles, to mean that the marriage is invalid only in a case where such a condition was intended to exclude all right, even the radical right, to intercourse. Thus: REBELLUS pars 2 lib. 2 q. 10 sect. 3 n. 19; VASQUEZ disp. 125 c. 6 n. 71; PONTIUS lib. 3 c. 11 n. 5; LIBERIUS De Matr. disp. 6 controv. 10 n. 175; LÉPICIER De Matr. q. 5 art. 4 n. 13; BILLUART tom. 10 De matr. diss. 3 art. 5 obj. 2. SUAREZ, however, De Incarn. pars. 2 disp. 7 sect. 1 post mediam, says that ST. THOMAS and his school are commonly against the opinion. And thus many others. Our own impression is that ST. THOMAS has not expressed his mind clearly on the matter and that discussion of his opinion is futile.

The opinion of ST. BONAVENTURE is likewise disputed. (Cf. ST. BONAVENTURE In IV Sent. lib. 4 dist. 28, 30 etc.) ESTIUS, In IV Sent. lib. 4 dist. 26 paragr. 8, says he is against the condition. PONTIUS lib. 3 c. 11 n. 5, and VASQUEZ disp. 125 c. 6 n. 64 and n. 69, deny it. And although SCOTUS (In IV Sent. lib. 4 dist. 30 q. 2) is sometimes cited as against the condition, it is not really clear what he held. HIQUAEUS in SCOTUM in IV Sent. lib. 4 dist. 31 q. unic. n. 54, and Vasquez disp. 125 c. 6 n. 68 claim that SCOTUS favors the condition.

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